

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

MM Docket No. 87-50

In re Applications of

METROPLEX COMMUNICATIONS, INC.  
(WHYI-FM) File No. BRH-860801YJ

For Renewal of License

SOUTHEAST FLORIDA BROADCASTING LIMITED PARTNERSHIP File No. BPH-861030MH

For Construction Permit for a  
New Commercial FM Station  
Ft. Lauderdale, Florida

Appearances

*Eugene F. Mullin, Nathaniel F. Emmons, Howard M. Weiss and Lawrence Roberts* on behalf of Metroplex Communications, Inc.; *Lewis I. Cohen, Morton L. Berfield and Roy W. Boyce* on behalf of Southeast Florida Broadcasting Limited Partnership; and *Norman Goldstein* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF  
CHIEF ADMINISTRATIVE LAW JUDGE  
THOMAS B. FITZPATRICK

Issued: January 4, 1989; Released: January 27, 1989

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#### PRELIMINARY STATEMENT

1. This proceeding involves the application of Metroplex Communications, Inc. (Metroplex) for renewal of license of Radio Station WHYI(FM), Ft. Lauderdale, Florida (WHYI or Y-100), and the mutually exclusive application of Southeast Florida Broadcasting Limited Partnership (Southeast) for construction permit for a new FM station to operate on the frequency now utilized by WHYI.

2. Metroplex's previous license renewal application had been granted for a one-year period ending December 20, 1986. *Metroplex Communications, Inc.*, Initial Decision of Administrative Law Judge Joseph Stirmer; (FCC 85D-74), released December 20, 1985; MM Docket No. 84-261. Metroplex filed the subject renewal application on August 1, 1986, and Southeast filed its competing application on October 30, 1986.

3. By *Hearing Designation Order (HDO)*, released March 12, 1987, the two applications were designated for hearing on the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

*Metroplex Communications, Inc. (WHYI (FM) )*, 2 FCC Rcd 1542 (MMB 1987). For purposes of determining Metroplex's entitlement to a renewal expectancy under the standard comparative issue, the Presiding Judge ruled that the relevant time period was the one-year period of WHYI's most recently granted license term, December 20, 1985, to December 20, 1986. (Tr. 20-21)

4. Prior to the hearing, the Presiding Judge designated additional issues against both applicants pursuant to motions to enlarge issues filed by Metroplex and Southeast, respectively. By *Memorandum Opinion and Order (FCC 87M-1287)*, released June 4, 1987, the Presiding Judge designated the following issues against Southeast:

To determine the facts and circumstances surrounding the certification of Southeast Florida Broadcasting Limited Partnership's financial qualifications; whether such certification was false and the impact thereof on the basic qualifications of Southeast Florida Broadcasting Limited Partnership to be a Commission licensee.

To determine whether Southeast Florida Broadcasting Limited Partnership is financially qualified to construct and operate its proposed station.

The burden of proceeding and the burden of proof on these two issues was placed upon Southeast.

5. By *Memorandum Opinion and Order (FCC 87M-1810)*, released July 31, 1987, as subsequently modified by *Memorandum Opinion and Order (FCC 87M-2111)*, released September 8, 1987, the Presiding Judge designated the following sponsorship identification issue against Metroplex:

To determine whether in the operation of Station WHYI, during the period February 1, 1982 to date, Metroplex violated Section 317 of the Communications Act of 1934, as amended and/or 47 C.F.R. 73.1212, and, if so, the effect on Metroplex's basic qualifications to be a Commission licensee.

The cited *Orders* did not allocate the burden of proof on this issue. However, the Presiding Judge ruled at the outset of the hearing that the burden of proof was on Southeast. (Tr. 132-34)

6. A prehearing conference was held on May 21, 1987, and hearings were held December 8-11, 15-18, 21-23, and 28-29, 1987, in Washington, D.C.; January 25-27, 1988, in Miami, Florida; and February 10 and March 2, 1988, in Washington, D.C. The record was closed on March 2, 1988. (Tr. 4514) Proposed Findings of Fact and Conclusions of Law were filed by the applicants and the Mass Media Bureau (Bureau) on May 20, 1988. The applicants filed Reply Findings on June 24, 1988.

## FINDINGS OF FACT

### I. The Comparative Issue

7. As noted, *supra*, this proceeding involves the application of Metroplex for renewal of its license to operate WHYI(FM), Ft. Lauderdale, Florida, and the mutually exclusive application of Southeast for a construction permit to establish a new FM broadcast station in Ft. Lauderdale, utilizing the frequency currently held by WHYI(FM).

#### A. The Community and Area To Be Served

8. Ft. Lauderdale, located on Florida's Atlantic coast, is part of the major metropolitan area that includes Miami (Dade County), Ft. Lauderdale, and the Palm Beaches (Palm Beach County). Ft. Lauderdale, population 153,279, is located in Broward County, with a population of 1,018,200. Adjacent to the south is Dade County with a population of 1,625,781, and to the north is Palm Beach County with a population of 576,863. The principal communities in the area are Ft. Lauderdale, Hollywood, West Palm Beach, Miami, Miami Beach, and Hialeah. (Metroplex Ex. 5A, pp. 4, 8-10)

#### B. Metroplex Communications, Inc. (Metroplex)

##### (1) Ownership and Management - Integration

9. Metroplex, a corporation with headquarters in Cleveland, Ohio, is owned by the following stockholders: Norman Wain (Wain), 46.6473%; Robert Weiss (Weiss), 46.6473%; David Ross (Ross), 3.8200%; Lewis Fischer, 0.9618%; Charles Schaefer, 0.9618%; Nina Wain, 0.4809%; and Leona Weiss, 0.4809%. Wain is Chairman, Chief Executive Officer, and a Director of Metroplex. Weiss is President, Chief Operating Officer, Secretary, and a Director of Metroplex. Ross is Executive Vice President of Metroplex and President of Metroplex's WHYI Division, with corporate level responsibilities for overseeing the operation of Metroplex's Florida stations. (Metroplex Ex. 1, ¶¶ 3-4; Metroplex Ex. 98, p. 1; Tr. 154)

10. Metroplex, which was founded by Wain and Weiss, has been the licensee of WHYI since 1978. Ross has been the General Manager of WHYI since 1978, except for a two-year period in 1980-82 when he served as Group Vice President for Metroplex's Florida stations. Wain, as Metroplex's Chief Executive Officer, has the ultimate responsibility for establishing and administering the overall operating policies of WHYI and Metroplex's other stations. (Metroplex Exs. 1 and 2) Metroplex proposes no integration of ownership into management and does not claim integration credit for any of its principals.<sup>1</sup>

##### (2) Other Media Interests

11. Metroplex is the licensee of the following radio stations: WHYI(FM), Ft. Lauderdale, FL; WKIX(AM), Raleigh, NC; WYLT(FM), Raleigh, NC; WRFX(FM), Kannapolis, NC; WPRD(AM), Winter Park, FL; WJYO(FM), Mt. Dora, FL; WHBO(AM), Pinellas Park, FL; WNLT(FM), Clearwater, FL; WFYV(AM), Jacksonville, FL; and WFYV(FM), Atlantic Beach, FL. As of the January 5, 1987, "B cut-off" date in this proceeding, the following stations were also attributable to Metroplex: WRKB(AM), Kannapolis, NC; WCPT(AM), Alexandria,

VA; WCXR(FM), Woodbridge, VA; and WOIO(TV), Shaker Heights, OH (16% ownership). (Metroplex Ex. 98, pp. 1-2)

##### (3) Renewal Expectancy Re WHYI (FM)

12. As noted, *supra*, the relevant time period for purposes of determining Metroplex's entitlement to a renewal expectancy under the comparative issue is the period December 20, 1985, to December 20, 1986. (Tr. 20-21)

##### (a) WHYI's Public Service Philosophy

13. Three principles guided WHYI's approach to serving community needs during the renewal period, December 20, 1985, through December 20, 1986. (Metroplex Ex. 1, ¶ 6, Tr. 20-21, 384) The first was that WHYI and its staff should be actively involved in community activities. The second principle was that WHYI should provide a forum for community expression. (Tr. 580) The third principle was that WHYI should use its entertainment programming to foster participation by the public in worthy community activities. (Metroplex Ex. 1, ¶ 117) As detailed, *infra*, WHYI sought to provide an entertainment vehicle for publicizing the public service messages of charitable organizations and for raising funds for charities directly. (Metroplex Ex. 1, ¶¶ 28, 29)

##### (b) WHYI's Ascertainment Efforts

14. In order to ascertain the community's needs and interests, members of the WHYI staff, in March, June, September, and December 1986, participated in formal group interviews of area community leaders sponsored by the South Florida Radio Broadcasters Association. Ross did not attend any of the interview sessions. (Metroplex Ex. 1, ¶ 12, Tr. 389) However, Ross reviewed the interview forms completed by the WHYI staff members. (Metroplex Ex. 1, ¶ 12, att. 3) About 75 community leaders of Broward and Dade Counties from government, charitable, business, minority, women's, health, senior citizens', children's, religious, educational, political, and other civic organizations were interviewed during these sessions. (Metroplex Ex. 1, ¶¶ 11-20)

15. The March 20, 1986, session was attended by Joan Siani (Siani), WHYI's Public Affairs Director, and Constance Smith (Smith), the station's Business Manager. The March 21, 1986, session was attended by Siani and Julie Wilson, the station's Assistant Promotion Director. The session on June 9, 1986, was attended by WHYI's General Sales Manager and a programming department employee. The session on June 20, 1986, was attended by Siani and an employee of the WHYI business office. A session on September 17, 1986, was attended by employees in book-keeping and sales. The September 18, 1986, session was attended by Siani and Smith. The session on December 17, 1986, was attended by a programming department employee, and the other session on December 17, 1986, was attended by Smith and a Ms. Walker, whose position is not identified. (Metroplex Ex. 1, ¶¶ 11-20)

16. The sessions took place in two or three rooms simultaneously and each WHYI employee would go to a different room and complete community leader interview forms for the persons interviewed. (Metroplex Ex. 1, att. 3)

17. Ross, who did not attend any community leader interviews, requested Peter Fulton, an "FCC compliance" consultant hired by Metroplex, to prepare an analysis of

the needs ascertained from June 1985 to June 1986 in terms of the percent of interviewees mentioning certain problems. (Metroplex Ex. 1, ¶ 21, and att. 4; Tr. 392-93) Ross reviewed the written ascertainment summaries with his staff, urging them to deal with the principal issues. (Tr. 571-72, 582; Metroplex Ex. 1, att. 1) The station's Public Affairs Director, Joan Siani, made specific programming recommendations based on the community leader ascertainment interviews. (Metroplex Ex. 1, att. 2) Ross correlated several programs directly with ascertained needs and problems, including programming addressing Ft. Lauderdale's Spring Break, WHYI's Highway Helper program, programming concerning activities of the Broward County Sheriff's Department, traffic reports, and WHYI's campaigns against drunk driving and drug abuse. (Metroplex Ex. 1, ¶¶ 100, 101, 116, 122; Tr. 572-75, 582-83)

18. The station's compliance consultant, Fulton, usually came to the station once a month and was given the daily records of what the logs showed for the amount of news and Public Service Announcements (PSAs) and other information as to what was broadcast. (Tr. 396) Fulton reviewed the ascertainment forms and programming, and he and Ross discussed this information and, from time to time, Ross would direct that certain problems be addressed. (Tr. 397) Quarterly, WHYI prepared issues/programs lists and placed them in the public file. The lists highlighted WHYI's programming, addressing some of the significant issues of public importance in the station's service area, focusing on Ft. Lauderdale, the community of license, and Broward County. The lists were drafted by Fulton based on records maintained by the station's public affairs director, news director and office manager. These station personnel and Ross reviewed the drafts before they were placed in the public file. (Metroplex Ex. 1, ¶ 25, att. 5; Tr. 396-97)

19. WHYI supplemented its formal ascertainment with informal interaction between the station's staff and members of the public at public service events and school or charity functions. Ross encouraged his employees, especially his on-air staff, to participate at such events so as to increase their sensitivity to community issues. Another means of ascertainment was on-air interaction with the station's listeners, particularly on the "Morning Show," where listeners who telephoned in were put on the air to discuss issues of concern to them, and where comments of the public were aired in a segment called "Y-100 Listens to You." The staff, to the extent they reported problems or needs, did it verbally or by DJO memos. In ascertaining community needs and interests, WHYI also drew upon the involvement of its management employees in various community organizations. (Metroplex Ex. 1, ¶¶ 11-20, 22-23, 73-74, 79, 106; Tr. 394-95)

(c) *WHYI's Performance During the License Period - 12/20/85 - 12/20/86*

(1) *Quantitative Analysis Re Programming*

20. The record contains WHYI programming data for a 1986 composite week selected by extrapolation from the most recent composite week specified under former Commission requirements for Florida renewals. (Metroplex Ex. 1, ¶¶ 126-27) The data reflects the following amounts and percentages of broadcast time (excluding commer-

cial) that were devoted to various categories of programming during the composite week. (Metroplex Ex. 1, ¶ 129; Southeast Ex. 10)

24 - Hour Day		
	Minutes	Percentage
News	312.5	3.1
Sports	44.75	0.44
Public Affairs	191.0	1.9
PSAs	31.5	0.31
TOTAL	579.75	5.75

These data do not reflect unlogged comments and discussions about civic activities and news events that occurred, usually on an impromptu basis and often involving comments from the public.<sup>2</sup> (Metroplex Ex. 1, ¶ 130) The "news" category includes newscasts, weather, traffic reports, and entertainment news ("Joni Goes to Hollywood"). (Tr. 533, 562-63) The program "Joni Goes to Hollywood" totaled 5 minutes of the 312.5 minutes of "news" logged during the composite week. (Tr. 563; Southeast Ex. 10, ¶ 1) The composite week figure includes in the category of public affairs a 30 minute program entitled "Powerline." (Tr. 536; Southeast Ex. 8, p. 3)

(2) *WHYI's Issue Responsive Programming*

21. WHYI broadcast the following programs designed to address ascertained needs:

22. *The "Morning Show"* - This station-produced program was broadcast from 6-10 a.m. on weekdays. It was local in orientation, including a mixture of popular records, humor, news, sports, weather, school information and special features. The program was interactive in nature, depending heavily on phone calls from listeners expressing their opinions on various subjects, their interests and their reaction to station programming and promotions. During the "Morning Show," four 5 minute newscasts were broadcast at 20 minutes after the hour, and three 5 minute sportscasts were broadcast at 50 minutes after the hour. Traffic reports were also broadcast during the "Morning Show" and reports on the weather were broadcast during the "Morning Show" and reports on the weather were broadcast throughout the day. These newscasts and reports are more fully discussed, *infra*. (Metroplex Ex. 1, ¶¶ 79-80; Southeast Ex. 10)

23. During the "Morning Show" newscasts, the station followed many news stories on a continuing basis, such as the overcrowding in Broward County Jails, efforts to reduce rowdiness during the Spring Break, school issues in both Broward and Dade Counties and labor and financial problems of Miami-based Eastern Airlines. WHYI's "Morning Show" newscasts provided information about civic events including Winterfest, the March of Dimes Superwalks, and the Calle Ocho in Little Havana in Miami. The newscasts also provided information about serious public concerns such as contaminated water supplies, need for blood donors, drunk drivers, and the need for volunteers to search for a missing child. (Metroplex Ex. 1, ¶¶ 83-85, att. 24)

24. From time to time WHYI aired discussions of issues and special events on the "Morning Show," usually with listener participation. For example, on January 29, 1986, the station broadcast listener reactions to the Space Shuttle disaster, which had occurred the previous day. On May 5, 1986, WHYI broadcast discussion by parents, students, and a School Board Member of a controversial

decision to ban shorts and skateboards on all Broward County school campuses. The 30 minutes of discussion was a total of various shorter segments interspersed throughout the program. (Tr. 489-90) On July 15, 1986, the station devoted approximately 25 minutes to discussion of a controversial plan for painting a local highway tunnel. This discussion, which was not planned in advance, consisted of a series of short segments aired throughout the program. (Tr. 490-91) On August 20, 1986, the "Morning Show" broadcast approximately 20 minutes of discussion interspersed during the program concerning pit bull dogs and their potential safety threat.

25. On November 21 and 24, 1986, the station devoted approximately 45 minutes to a dialogue among listeners, the station's air staff, and Coast Guard and U.S. Customs officials on the propriety of Coast Guard drug search methods. On November 21, there was discussion about the manner and technique of the Coast Guard and Customs personnel, which engendered telephone calls from listeners. The discussion was precipitated by the conversation of a disc jockey with a listener. The disc jockey's boat had been stopped and searched by the Coast Guard in a manner he considered abusive. The November 24th show provided time to Coast Guard and Customs officials to provide rebuttal and to explain the difficulties of trying to stem the flow of illegal drugs into South Florida. The officials asserted that mistreatment of boaters was not condoned. They also pointed out that boaters have a right to file complaints and that they had received few such complaints. (Metroplex Ex. 1, ¶¶ 98-99; Tr. 497-98)

26. In connection with the Statue of Liberty centennial, to which WHYI devoted coverage in June and July, 1986, the station broadcast interviews with public officials and expressions of viewpoint by listeners about what the Statue of Liberty meant to them. (Metroplex Ex. 1, ¶¶ 86, 91-93, 95; Tr. 493-96)

27. Between June 16, 1986, and July 4, 1986, the primary focus of the "Morning Show" each weekday morning was a discussion concerning the 100th anniversary of the Statue of Liberty. Records were played and commercials aired during these programs. (Tr. 494) The discussions involved callers and took place over the air when records were not being played. The listeners who called in made comments on what the Statue of Liberty meant to them, how they came to this country, and why they were proud to be Americans. (Tr. 493-94) Leading up to and during the Liberty Day broadcasts, WHYI broadcast interviews with politicians and other dignitaries, including the area congressman, a local commissioner, local mayors, and the Governor of Florida. The interviews were one-on-one between station personnel and the interviewee as to their ethnic heritage and how their ancestors arrived here. Some were broadcast live, others were taped and broadcast later. (Metroplex Ex. 1, ¶¶ 55-56, 92-93; Tr. 493-95)

28. WHYI addressed issues of concern to the community in two regularly scheduled program-length public affairs programs, "Here's Help" and "Y's Rap."

29. "Here's Help" was a weekly one-hour public affairs and informational interview program broadcast at either 6:00 a.m. or 7:00 a.m. on Sundays. It was broadcast at 7:00 a.m. through March 6, 1986, and on July 1 and 13, 1986, and at 6:00 a.m. on the remaining Sundays during the license period. (Metroplex Ex. 91) The program, which took its name from a local nonprofit drug rehabilitation center called Here's Help, Inc., primarily ad-

ressed issues relating to the drug problem.<sup>3</sup> (Metroplex Ex. 1, ¶ 110; Metroplex Ex. 36, ¶ 1; Metroplex Ex. 91; Tr. 3871-72) Guest interviewees included local police chiefs, drug abuse counsellors, drug rehabilitation patients, students, doctors, attorneys, and social service officials. (Metroplex Ex. 1, att. 29) The purpose of "Here's Help," according to its producer, director and moderator, Salvatore Zocco (Zocco), Assistant Program Director at Here's Help, Inc., was to help educate the public and alleviate social and personal difficulties caused by drug abuse and other social problems. (Metroplex Ex. 36 ¶ 3) Concerned listeners were often encouraged to contact "Here's Help" guests after the program for further information or advice, and typically listeners did respond. (Metroplex Ex. 36, ¶ 4; Tr. 3894)

30. Zocco was neither paid for preparing and presenting the "Here's Help" program; nor was he reimbursed for expenses. (Tr. 3865, 3867, 3869, 3880) He typically prepared it at 6:00 p.m. of the Thursday prior to the air date. He lined up the guests who met him at the WHYI studio. WHYI provided no budget for the program and there were no WHYI employees present at the taping. (Tr. 3866-69) Zocco was initially taught by WHYI personnel how to tape the show, WHYI's subsequent input was to provide tapes, studio facilities and air-time. (Tr. 3870)

31. "Y's Rap" was a weekly one-hour public affairs and informational interview program broadcast at 6:00 a.m. on those dates that "Here's Help" was broadcast at 7:00 a.m., and otherwise at 7:00 a.m. on Sundays. The program was produced and hosted by WHYI's Public Affairs Director, Joan Siani,<sup>4</sup> who interviewed guests on a variety of topics. Among the subjects discussed were: AIDS; tax law changes; the problems of poverty and hunger; discrimination against blacks in the communications industry; women in business; need for improvements in the local school system; teenage pregnancy rate in Miami; cystic fibrosis; new state law government dispensation of prescription drugs; the Crime Stoppers Program; local cultural arts programs; pros and cons of casino gambling; Child Assault Prevention Project; fire prevention; Enterprise Zone Referendum on election ballot; Ft. Lauderdale tourism; drug rehabilitation; and suicide prevention. (Metroplex Ex. 1, ¶ 108, att. 28; Metroplex Ex. 91; Tr. 514)

32. "Y - 100 Listens to You" - WHYI broadcast short-form public affairs segments featuring comments and discussion of topical concerns by members of WHYI's listening public. There was a segment of the "Morning Show" called "Y-100 Listens to You," which gave listeners and community members an opportunity to express their opinions on a series of topics that WHYI found to be of interest to the public. To produce this program, WHYI's News Director went out into the community and asked persons to comment on topics of interest. WHYI edited the taped responses and broadcast them over the air virtually every weekday during 1986 beginning in April. These 60-second segments were broadcast during morning drive time four times a day until May, when they began running eight times a day on weekdays and four times a day on Saturdays. These four additional segments were broadcast between 2:00 a.m. and 6:00 a.m. (Tr. 513) In August 1986, WHYI also began running the segment twice during weekday mid-day shifts. (Metroplex Ex. 1, ¶ 106; Tr. 510-13)

33. Among the issues on which listeners expressed themselves on "Y-100 Listens to You," which was logged as a public affairs program, were: casino gambling in

South Florida; help for the homeless; the quality of public education; cable television pornography ban; overcrowding in local jails; Florida state lottery; the 55 mph speed limit; AIDS; English as the official state language; cigarette tax; mandatory seat belt law; freeze on insurance rates; need for commuter rail system; Meese Commission report on pornography; traffic and transportation problems; use of U.S. military to combat drug trafficking; cuts in funding for social services; statewide automobile inspections; mandatory drug testing; need for pit bull ordinance; smoking ban on domestic airlines; handgun control; tax reform legislation; fairness of divorce laws; and Federal funding to fight drug abuse. (Metroplex Ex. 1, att. 27; Tr. 469)

34. *WHYI's News Broadcasts* - As noted, *supra*, during the "Morning Show" four 5 minute newscasts were broadcast at 20 minutes after the hour and three 5 minute sportscasts were broadcast at 50 minutes after the hour. (Metroplex Ex. 1, ¶ 80) The newscasts during the "Morning Show" typically included a 60 second commercial and a 15 second public service announcement. (Tr. 466) In addition to the "Morning Show" newscasts, the station broadcast four newscasts Monday through Saturday at 2:20, 3:20, 4:20 and 5:20 a.m. These broadcasts contained strictly news material. (Tr. 466, 470) The news for the 2:20-5:20 a.m. broadcasts was the same. They were prepared and taped between 11:00 a.m. and 5:00 p.m. the previous day with some additional news taken off the Associated Press wire by the announcer. (Tr. 475, 480, 593) The disc jockey on duty when the newscasts were aired could add something to the reports if an event occurred during the night which warranted it, but only after obtaining telephone permission from station management. Ross cited one instance when this happened. (Tr. 594)

35. The program "Joni Goes to Hollywood," which presented news about the entertainment field, was also considered a newscast. (Tr. 469-70, 533) WHYI's newscasts were prepared by Ron Hersey (Hersey), the station's news director,<sup>5</sup> who relied on several sources. (Tr. 451) The station subscribed to the Associated Press News Service. The news director gathered news by reviewing various local and national newspapers and magazines and by monitoring television and all news station reports. The station also obtained news leads from listeners who called in and Hersey developed news stories while conducting "Y-100 Listens to You" interviews. (Metroplex Ex. 1, ¶ 81) According to Ross, WHYI placed special and continuing emphasis on news events that had special importance to Ft. Lauderdale, Broward and Dade Counties, and South Florida. (Metroplex Ex. 1, ¶ 82; Tr. 474, 478-79)

36. The only other member of the staff who was occasionally involved in preparing newscasts was Mark Lipof (Lipof), who prepared news if Hersey was on vacation or otherwise unavailable. (Tr. 593) Hersey, in addition to news, was responsible for the "Y-100 Listens to You" interview segments, made appearances at sales and charitable events, and participated in a program entitled "Sunday Morning Countdown" that was prepared on Fridays. In addition to preparing and presenting news on the "Morning Show," he did voice impersonations during other parts of the "Morning Show." (Tr. 472-74)

37. News coverage on the station included reports on local civic events, ballot issues, police misconduct, drugs, labor disputes, municipal annexation, crime, county budget cuts, street demonstrations, political campaigns, local

ordinances, election results, water contamination, AIDS, airport expansion, highway problems, conditions in local jails, public health matters, mandatory seat belt law, the Pope's visit to Miami, teachers' salaries, President Reagan's appearance in Florida, shark sightings, highway deaths, tropical storms and hurricanes, public transit, tax increases, traffic law enforcement, and other topics. (Metroplex Ex. 1, att. 24)

38. *Traffic Reports* - As noted, *supra*, the "Morning Show" included traffic reports. These reports ran a total of four to eight minutes each weekday on the show. The reporter, Lipof, was a part-time employee. The traffic reporter monitored police scanners and relied on various contacts with enforcement officials in sheriff offices and various police departments who patrolled or monitored traffic. He also relied on individual citizens who called him with information. Ross acknowledged that listening to traffic reports on other radio stations was one source of information. (Tr. 502) The reporter, for two months in 1986, had a cellular traffic line whereby anyone with a cellular car phone could call the station with on-site information about traffic conditions. (Metroplex Ex. 1, ¶ 100, att. 25; Tr. 499-502, 597, 609)

39. *Weather Reports* - Weather reports were broadcast during the "Morning Show" for approximately 60 seconds per hour and at other times during the 24 hour broadcast day, averaging 30 seconds per hour. The station did not have its own meteorologist on the staff, nor did it subscribe to a weather service. It contracted with a company for beach reports which were broadcast four times a day during weekends. The weather reports were taken from the wire service and from NOAA. During the hurricane season, the station was in contact with the Coast Guard. Hersey prepared the weather reports during the "Morning Show" and the announcer on duty prepared them at other times. (Metroplex Ex. 1, ¶¶ 80, 140; Tr. 507-10)

40. *Sports* - Three 5 minute sports reports were broadcast at 50 minutes past the hour during the "Morning Show." Sports was a major community topic of interest in Ft. Lauderdale and South Florida. Ft. Lauderdale is the home of the New York Yankees during Spring training, and is also the home of the swimming Hall of Fame. Additionally, the professional Miami Dolphins and the University of Miami Hurricanes are in the area. High school football scores during the season were broadcast between 10-11 p.m. on Thursday nights and again on Friday morning along with the Football Player of the Week. (Metroplex Ex. 1, ¶ 102, att. 26; Tr. 505-07)

41. *School Lunch Reports* - WHYI broadcast Broward, Dade, and Palm Beach County school lunch menus and school closing information on the "Morning Show." The Dade County menus were reported in English and Spanish. The reports let mothers and children know what was available at the schools, and were approximately three minutes in length. They were broadcast once each school day. (Metroplex Ex. 1, ¶ 103; Tr. 507)

42. During most of 1986, WHYI broadcast during the "Morning Show" a 90-120 second segment once or twice a week in which a representative of the Broward County Humane Society would bring and describe one or more pets and encourage people to adopt them. (Metroplex Ex. 1, ¶ 105)

43. *Dateline* - Based on informal research which indicated that many single people were unhappy with their single status, the station produced a program entitled "Dateline." The program was designed to give singles an

opportunity to express their hopes and frustrations concerning companionship, and to allow for commentary by psychologists and other professionals in the field. The program was initiated in May 1986 as a one hour live show on Sunday evenings. The program contained commercials but no records. However, the program did not maintain a level of listener interest sufficient to justify its continuation and it was discontinued in mid-August. (Metroplex Ex. 1, ¶¶ 112-115, att. 30; Tr. 515-19, 524-26, 564)

44. *Drunk Driving and Drug Abuse Campaigns* - WHYI took an active role in the effort to encourage people not to drive after drinking and to encourage those people who do drink to do so responsibly. This campaign stemmed from a personal commitment that Ross made to U.S. Senator Paula Hawkins to help coalesce South Florida broadcasters to educate listeners about the dangers of drinking and driving. (Metroplex Ex. 1, ¶ 116) Working with entertainers, local restaurants and nightclubs, and local high schools, WHYI produced a series of announcements combatting drunk driving, using the theme "Arrive Alive. Don't Drink and Drive." The announcements featured either a prominent artist/entertainer or a member of the Florida Entertainment and Dining Association (FEDA). Some of the entertainers who spoke out on WHYI against drunk driving were David Letterman, Janet Jackson, Miami Sound Machine, Sting, Heart, Eddie Money, Paul Hogan, Sheila E., Van Halen, Phil Collins, Mister Mister, Anita Backer, and Nu Shooz. The FEDA announcements featured representatives of local restaurants or nightclubs encouraging people to enjoy themselves without mixing alcohol and driving. During the renewal period, WHYI broadcast approximately 4,350 such announcements, which were of varying lengths. The composite week logs reflect that 75 15 second drug driving PSAs and 2 30 second drunk driving PSAs were run. (Metroplex Ex. 1, ¶¶ 116-18, atts. 31-33; Tr. 526; South-east Ex. 10)

45. One of the participants in the FEDA PSAs was Metroplex public witness, Mary Fanizzi, of Penrod's on the Beach, a WHYI advertiser. (Metroplex Ex. 53, ¶ 1) Fanizzi confirmed that the issue of drinking by young people during the Ft. Lauderdale spring break period was an important issue in the area which could have a serious impact on Penrod's and the hospitality industry if a lessening of young people visiting Ft. Lauderdale during the spring break occurred. (Tr. 4194-95) The text of the PSAs involving Penrod's was:

Hi, my name is Mary Fanizzi, and I'm with Penrod's All American Beach Bar, reminding you to come down and have fun at Penrod's, and remember, please don't drink and drive. (Tr. 4198)

46. WHYI also participated as the official radio station for Project Graduation in 1986. This project sought to combat drinking and driving among teenagers during the high school prom and pre-graduation party season. WHYI broadcast on-air announcements supporting Project Graduation, and its disc jockeys attended Project Graduation events at local high schools. WHYI invited students to tape their own personal messages against drunk driving, which WHYI broadcast as PSAs in May and June 1986. WHYI also worked with high school Students Against Drunk Driving (SADD) organizations throughout

the year and broadcast announcements about SADD sponsored events at local schools. (Metroplex Ex. 1, ¶¶ 116, 119-21, att. 35; Tr. 527)

47. Additionally, WHYI aired programming addressing the problem of drug abuse and the need for drug treatment. In addition to the "Here's Help" public affairs program and the Haunted House promotion, WHYI broadcast announcements in 1986 for the Here's Help drug treatment center and suicide hotline, the Victoria Hospital Cocaine Hotline, Spectrum (cocaine treatment center) Family Counseling Services, and the Dodge Hospital Teenage Alcohol and Drug Problem Hotline. WHYI sent its mobile van to support the opening of a new female dormitory at Here's Help and the Rally for the Red Ribbon/Just Say No To Drugs effort co-sponsored by Informed Families of Dade County, a group dedicated to drug and alcohol-free activities for local youths. As noted, *supra*, WHYI broadcast "Y's Rap" public affairs programs featuring representatives of Narcotics Anonymous and the New Horizons Clinic for Specialized Treatment for Cocaine Dependency. (Metroplex Ex. 1, ¶ 122)

### (3) *Community Involvement of WHYI and Its Staff*

48. Ross explained that "part and parcel of [his] formula for building the radio station has been community involvement." He did not consider public service programming as the sole means to meet his obligations. A major focus of WHYI's public service efforts was the station's participation in local charities and community service activities. Participation included on-air PSAs, promotional announcements and discussions, news reports and on-air reports from the scene of events and public affairs programs. The station also provided support at the site of events with disc jockeys and equipment. WHYI's PSAs were produced by the station and promoted either local South Florida organizations or local chapters of national organizations. PSAs usually were read from prepared scripts. Promotional announcements generally involved more extended disc jockey discussion concerning an activity and were done either with a script or on an impromptu basis. (Metroplex Ex. 1, ¶ 26, att. 6)

49. Set forth, *infra*, are the contributions of air time,<sup>6</sup> staff activities, and logistical support furnished to a number of charitable organizations.

50. *March of Dimes* - In 1986 WHYI was the exclusive radio sponsor of the Broward County Superwalk and the Dade County Superwalk for the South Florida Chapter of the March of Dimes. Betty Lou Randolph, Chapter Director of the South Florida Chapter of the March of Dimes, and a public witness, explained that WHYI was made the exclusive sponsor because of "the outstanding performance the station has given to the March of Dimes over the years."<sup>7</sup> (Metroplex Ex. 36, ¶ 6) WHYI's sponsorship entailed personal involvement in the campaign by Ross, who was on the Board of Directors of the South Florida Chapter of the the March of Dimes, and Anthony Novia, WHYI's Promotions Director, who was the Honorary Youth Chairman for the 1986 Superwalks. (Metroplex Ex. 36, ¶¶ 9, 24; Metroplex Ex. 50, ¶ 2) From March 5-22, 1986, the station aired PSAs and promotional announcements for the two March of Dimes Superwalks held in Dade and Broward Counties. The WHYI staff made on-air promotional announcements, attended planning meetings, or walked in one of the walkathons. In the weeks leading up to the events, WHYI coordinated personal appearances by its air personalities and staff members, utilizing its van

with the WHYI logo on it, at school assemblies and local businesses to help create interest in the Superwalk, and explained the advance requirements for participation. (Tr. 398-99, 3825) On the day of the events, WHYI provided entertainment and prizes at the locations and announced reports from the events about their progress. The station van was present and periodically drove the walk route. (Metroplex Ex. 34, ¶ 7; Tr. 3827) The station broadcast live reports, including traffic reports, of unspecified frequency and duration. (Metroplex Ex. 1, ¶ 17; Metroplex Ex. 34, ¶¶ 7-8) WHYI, by using its industry contacts, obtained the appearance of the Miami Sound Machine at the events. (Tr. 400) In the ensuing weeks, WHYI broadcast announcements reminding walkers of the need to collect their pledges. The Superwalks raised \$1,013,000 for the March of Dimes. Other WHYI activities for the March of Dimes in 1986 included announcements for several entertainment events benefitting the March of Dimes and an appearance at a dance that WHYI donated to the top fundraising school. WHYI provided a disc jockey and music. Its logo was prominently displayed. (Metroplex Ex. 1, ¶ 27; Metroplex Ex. 34, ¶¶ 20-21; Metroplex Ex. 36, ¶¶ 11, 22)

51. *Multiple Sclerosis* - WHYI raised money for the South Florida Chapters of the National Multiple Sclerosis Society in April and May, 1986. The station served as the official radio station sponsor of the Third Annual "Ugliest Bartender Contest," in which bartenders were encouraged to collect donations from their patrons, with a bartender receiving one vote for every 25 cents collected. WHYI supported this charitable activity with on-air announcements, disc jockey discussion, and reporting of results. From April 2 to 16, WHYI broadcast announcements and disc jockey discussions promoting the start of the contest. During the April 16-May 18 contest dates, WHYI discussed the contest during the "Morning Show" and broadcast PSAs throughout the day. The station periodically announced which bartenders were raising the most money. As part of the contest, WHYI also broadcast PSAs emphasizing the need for responsible drinking by those who drive. During the contest, WHYI's Sports Director, John Kross, made personal appearances throughout South Florida to support the efforts of WHYI and the National Multiple Sclerosis Society. (Metroplex Ex. 1, ¶¶ 29-32)

52. A document prepared by Multiple Sclerosis (MS) reflected that the event was co-sponsored by a local beer distributor and a "major radio station." (Metroplex Ex. 1, att. 7, pp. 2-5) This document indicated that:

[T]he program provides tremendous product promotion and public relations impact for the brewery and the taverns.

It reflected that the radio station, in addition to providing public service coverage, could receive paid promotions and advertising spots from the brewery. (Metroplex Ex. 1, att. 7, p. 2) MS also promised that all promotional material, including bartender kits, posters, buttons, tee shirts, instructional sheets and table top tents, would bear the WHYI logo and WHYI would be mentioned in all press releases. MS pointed out that WHYI would gain increased visibility among bars and their clientele, especially since WHYI would have a captive audience for announcements as to the winners in the promotion. (Metroplex Ex. 1, att.

7, p. 4) The bartender registration form had the MS logo flanked by the Miller beer and WHYI logos in equal prominence. (Metroplex Ex. 1, att. 7, p. 18)

53. *Muscular Dystrophy* - WHYI was also involved in the local South Florida activities connected with Jerry Lewis' 1986 national Labor Day Telethon for the Muscular Dystrophy Association (MDA). The WHYI on-air staff worked with WTVJ-TV, Channel 4, Miami, to raise money at the 17th Street Marriott in Broward County and the Dadeland Mall in Dade County, the largest mall in Miami. WHYI supported the effort on the air with PSAs and disc jockey discussion in advance of and during the event. The disc jockeys encouraged listeners to meet them at the Marriott and the Mall to donate money. A giant fish bowl was set up to collect funds. The WHYI logo was displayed at or near the fish bowl. (Tr. 3947) WTVJ-TV televised the proceedings from the Mall, and WHYI personalities, wearing WHYI tee shirts, were featured on the local cut-ins telecast by Channel 4 thanking contributors for their donations and encouraging people to visit the Mall to contribute. (Metroplex Ex. 1, ¶ 33; Metroplex Ex. 37; Tr. 402-03)

54. Gregory Birkhimer, Program Coordinator for the Muscular Dystrophy Association, expressed the view that WHYI was "a major contributor to the success" of the telethon. He explained that the MDA chose WHYI to promote the events because the station reached a large and diverse audience in terms of age and income. He also explained that it was important to have the WHYI logo associated with MDA because they wanted to be associated with an upbeat positive radio station that could portray its message to the people. (Tr. 3959-62) Later in the year, WHYI broadcast reports covering a major breakthrough in Muscular Dystrophy research. (Metroplex Ex. 1 ¶ 33; Metroplex Ex. 37, ¶¶ 2 and 9)

55. Also during 1986, a station representative attended a party sponsored by MDA for a high school group. The station representative, who was wearing a jacket displaying the WHYI logo, played music and distributed gifts, including WHYI tee shirts. (Metroplex Ex. 37, ¶ 5; Tr. 3952)

56. *Shark Attack Victim* - In October 1986, WHYI conducted a campaign to collect stuffed animals and other items for Helena Florez, a seven year old Ft. Lauderdale area girl who was hospitalized after being attacked by a shark. The station aired an unspecified number of announcements asking listeners to bring donations to the WHYI studio, and sent its mobile van across the state to Tampa to deliver the donations to the hospital. The station also urged listeners to contribute to a trust fund to help defray Helena's hospital expenses, an effort that raised several thousand dollars. (Metroplex Ex. 1, ¶¶ 34-35)

57. *Christmas Wish List* - During the period prior to Christmas 1985, WHYI was co-sponsor along with 7-Up and Winn Dixie stores of an event whereby grants of cash or merchandise would be given to needy persons. (Metroplex Ex. 1, ¶¶ 36-38) 7-Up put displays on counters in the Winn Dixie stores which had entry blanks persons could use to write to WHYI explaining their needs. (Tr. 407) The displays in the Winn Dixie stores referenced WHYI and displayed its logo. (Tr. 409) WHYI broadcast programming relating to this event of unspecified frequency and duration encouraging listeners to send in entry forms. WHYI selected the 20 most needy persons and it, along with 7-Up, donated gifts of cash, merchan-

dise, and services. WHYI donated \$5,000 cash and \$7,000 in advertising trade-outs. (Metroplex Ex. 1, ¶ 22; Tr. 407-08)

58. WHYI also broadcast announcements of unspecified number and duration asking listeners to donate toys to needy children through the Voice for Children's Rights. WHYI also promoted over the air the organization's infant and toddler clothing drives. (Metroplex Ex. 1, ¶¶ 36, 38)

59. *American Cancer Society* - In June 1986, WHYI supported the American Cancer Society with on-air announcements of unspecified frequency and duration and discussion about a fundraiser where South Florida personalities and business leaders were "arrested" and had to raise funds to "bail" themselves out. Some of the station's disc jockeys had themselves "arrested" on the air and invited listeners and the WHYI staff to donate "bail" money. WHYI supported a similar fundraiser for the Children's Cancer Clinic of the University of Miami in April 1986 called "Jail-House Rock." Ross was "arrested" and spent over three hours raising more than \$1,000. (Metroplex Ex. 1, ¶ 40)

60. *Greater Miami Heart Association* - On February 15, 1986, the Greater Miami Heart Association sponsored a jump rope competition among the schools at the Westland Mall in Hialeah, Florida. WHYI sent a disc jockey and engineer to the mall. It also brought the WHYI van and sound system and gave away prizes to participants. (Metroplex Ex. 45, ¶¶ 2-3)

61. *American Lung Association* - Between October and December 1986, WHYI participated in an on-air promotion for the American Lung Association's fundraising drive. The station also broadcast announcements of unspecified frequency and duration for several organizations that help people who wish to stop smoking. (Metroplex Ex. 1, ¶ 41; Metroplex Ex. 46, pp. 2-3)

62. *Daily Bread Community Food Bank* - In January 1986, WHYI devoted part of one of its "Y's Rap" programs to a discussion of the activities of Daily Bread Community Food Bank, a nonprofit organization that finds available food and moves it to agencies that feed the needy. (Metroplex Ex. 52, ¶¶ 2-3; Metroplex Ex. 1, att. 28, p. 1) The station also supported that organization's Thanksgiving drive to collect food for needy families by broadcasting announcements of unspecified frequency and duration to publicize the need for food donations and how donors could participate. Howard Cawein, the organization's Executive Director, noted that WHYI's assistance helped the project raise double the amount of food raised the previous year. (Metroplex Ex. 52, ¶ 4)

63. *United Negro College Fund* - During Black History Month, WHYI broadcast a co-promotion with McDonald's whereby 25 cents from each large soft drink sold by McDonald's went to support the United Negro College Fund. WHYI, as did other stations, supported this program by broadcasting an unspecified number of announcements. (Metroplex Ex. 1, ¶ 55; Metroplex Ex. 51, p. 2; Tr. 4082-84)

64. WHYI, along with other stations, also aired press releases for the Ronald McDonald House, a residence for parents of seriously ill children. (Metroplex Ex. 51, ¶¶ 2-3; Tr. 4078) McDonald's also had a program to support the Broward Sheriff's Office Youth Explorer recruitment effort. McDonald's made its locations available for use as places where youths could register for the program.

WHYI provided its van, with the WHYI logo, for a kick-off event at the McDonald's in Pembroke Pines. (Metroplex Ex. 51, p. 3; Tr. 4078)

65. WHYI was one of 5 radio stations in the market principally relied upon by McDonald's to reach the general audience. (Tr. 4086-87) McDonald's used WHYI for its only major station promotion in 1986. In this promotion, which was not charitable in nature, McDonald's distributed bumper stickers which WHYI would spot at random and award prizes. The bumper stickers bore the logos of both McDonald's and WHYI. (Metroplex Ex. 51, p. 3; Tr. 4079-81)

66. *Youth for Christ* - WHYI was involved in activities of Youth for Christ (YFC), a nonprofit Christian youth organization. From October 23 to November 1, 1986, YFC conducted its annual Haunted House events at locations in Broward and Dade Counties. These events were designed to promote two YFC programs, one directed to high school students and one to delinquent youth. YFC selected WHYI as the sponsoring radio station since it felt WHYI would "produce for us." (Metroplex Ex. 38, pp. 2-3)

67. WHYI provided promotional announcements of unspecified frequency and duration concerning the Haunted House events. During the events, the station also broadcast call-ins encouraging people to attend and offers of prizes for participants at the events. WHYI provided vans and station personalities at the locations of both events. There were banners with the WHYI logo at these events. (Metroplex Ex. 1, ¶ 56; Metroplex Ex. 38, ¶¶ 6-7; Tr. 3899)

68. *Job Expo* - WHYI was a sponsor and participant in the Dade County Public Schools Job Expo held April 14-18, 1986. The Expo was a combined Career/Job Fair for all 9th grade students and all 12th grade vocational program students in the Dade County Schools. WHYI supported the Job Expo with on-air discussion of the event, and WHYI staff members, including management and programming executives and personnel, spent time at the WHYI booth, which had the station logo, at the Fairgrounds, dispensing information concerning employment opportunities in radio. (Metroplex Ex. 1, ¶ 42) John W. Shaw, a Job Expo official, opined that "it was important to have WHYI at the fair because of the station's popularity among the teenagers who participated in the fair." (Metroplex Ex. 48, ¶ 4; Tr. 411)

69. *Summer Jobs for Youth Campaign '86* - WHYI also promoted the State of Florida Department of Labor and Employment Security's Summer Jobs for Youth Campaign '86. In addition to helping plan the campaign, WHYI broadcast an unspecified number of announcements regarding the Summer Jobs Hotline, co-sponsored the Summer Jobs for Youth '86 Kickoff Breakfast, secured corporate sponsorship by McDonald's, coordinated disc jockey appearances in connection with the campaign. (Metroplex Ex. 1, ¶¶ 43-45; Tr. 413-16) WHYI banners were hung outside five schools selected for Super Job Saturday. (Tr. 412-13) Anita Allbright, an official of Partners for Youth, which jointly organized the project, expressed the view that it was "very important for Partners for Youth to have WHYI involved to remind the children to participate in the summer jobs program." (Metroplex Ex. 56, ¶ 6; Tr. 4162-64)

70. *Other Jobs Programs* - WHYI staff members attended school Career Days and assemblies throughout 1986. These appearances, which were often accompanied by an

unspecified number of on-air announcements, included: the Parkway Middle School Career Days in Ft. Lauderdale; the South Florida Black Media Coalition's Job Fair; Ludlam Elementary School's Sports Career Day; the Coconut Creek High School's Career Month; the Lauderhill Middle School Career Day; the Taravella High School Career Day in Coral Springs; Broward County Community College's Employer Exploration Day; the Broward County Community College-North Campus Career Day; the Dade Employs the Handicapped Committee's Career and Opportunity Expo; and the Career Opportunity Day Conference sponsored by the Cuban National Planning Council and the Dade County Public Schools. WHYI also provided speakers to appear at the Hollywood Hills High School Career Series. (Metroplex 1, ¶¶ 46-47)

71. *Winterfest* - WHYI participated in Ft. Lauderdale's major civic event in 1986, the annual Winterfest and Boat Parade festival. Winterfest is a series of events in Ft. Lauderdale and surrounding communities held each year in December under the auspices of the Ft. Lauderdale Broward County Chamber of Commerce. (Tr. 3975) WHYI served as the official radio station for 1986 Winterfest and an official sponsor. In that capacity WHYI gave Winterfest approximately \$50,000 worth of free broadcast time to promote the events and assist the public in getting to and from the major events. (Metroplex Ex. 1, ¶ 48) Ina Lee, the President of Winterfest, who expressed the belief that WHYI has been a major factor in the success of Winterfest, and the owner-publisher of a tourist magazine placed in Ft. Lauderdale hotels, acknowledged that Winterfest "could not have paid, possibly, for the amount of air time we got on Y-100." (Tr. 3983) Lee readily acknowledged that Winterfest attracts many tourists to the area. (Tr. 3977-79) WHYI also helped ease traffic by announcing the times of drawbridge openings, where to park, and the best public viewing areas for the parade. Ross served as Vice President and a member of the Board of Directors of the Winterfest and Boat Parade of Greater Ft. Lauderdale, and Anthony Novia served as a Winterfest Committee Chairman. They both attended or hosted some Winterfest planning meetings throughout 1986. WHYI air personalities made personal appearances at Winterfest events, and WHYI helped arrange appearances by two popular singing groups, the Commodores and the Four Tops, at Winterfest events. (Metroplex Ex. 1, ¶¶ 48-50; Metroplex Ex. 40)

72. WHYI's role as the official radio station of Winterfest resulted in an exclusive relationship whereby WHYI was the only radio station allowed to produce spots for Winterfest, place a banner on the Winterfest Beach Ball, and be identified in Winterfest publications. (Tr. 3885-86) The reason Winterfest employs official media is because it could not otherwise adequately publicize events. At one point, it solicited bids for the position; however, the three bids made did not promise more than WHYI had been providing. (Tr. 3989-90) Winterfest was primarily financed by donations. The Chamber of Commerce, the Ft. Lauderdale Area Board of Realtors, the Marine Industries Association, and the Broward County Tourism Development Council, all contributed to the half-million dollar budget. Ross acknowledged that one of the benefits of involvement in Winterfest was the exposure WHYI received. (Tr. 428-29)

73. *Spring Break* - Ross was a member of the Ft. Lauderdale Spring Break Task Force, a civic group that organized five weeks of Spring Break "Olympic Type" games to provide alternative entertainment for the thousands of college students who travel to Ft. Lauderdale for their spring break. The purpose was to promote a healthy environment for students and a clean image for Ft. Lauderdale and South Florida. The event was also a charitable project benefitting the American Cancer Society. As the official radio station of the 1986 Spring Break Games, WHYI supported the event with an unspecified number of PSAs and disc jockey discussion. WHYI disc jockeys and staff members hosted the Games, and the WHYI sales staff helped solicit \$64,000 in sponsorship contributions, merchandise support, and school scholarships. (Metroplex Ex. 1, ¶¶ 63-64)

74. The Spring Break Task Force resulted from public concern as to the behavior of college students during the 1985 Spring Break. The Task Force conceived of the idea of having Olympic-like games on the beach in order to provide a wholesome activity for college students. (Tr. 3993-94) Ross explained that a significant group in the community believed that the influx of college students, known as spring break, should be discouraged. Actions designed to do so, such as building a wall on the beach, were taken, reducing the number of students from 250,000 to 75,000 or 80,000. Ross and other business leaders felt this was devastating the local economy. (Tr. 572-74) Ross acknowledged that the station had an interest in the health of the tourism industry and, more particularly, an interest in spring break, since advertising money was spent by such companies as beer and sun tan companies during this period. (Tr. 590-93)

75. At the game site there was a tower sign which included the WHYI logo as well as banners near the game site with the WHYI logo. (Tr. 435) The games were sponsored by the Budweiser beer company, which ran a schedule of paid commercial announcements on WHYI promoting the games. (Tr. 436-37)

76. *Calle Ocho Festival* - WHYI supported and co-sponsored the annual Calle Ocho (Eighth Street) Open House in Miami on March 9, 1986. This was a street festival organized by the Kiwanis Club of Little Havana. (Metroplex Ex. 1, ¶ 52) WHYI had its van at the event and had a 40 by 20 foot stage, including a banner with the WHYI logo, as well as a television station and an airline. WHYI personalities wearing station tee shirts were present all day long. (Tr. 429-31) WHYI arranged for, but did not pay for, the appearance of a national recording artist, Exposé, who appeared on the WHYI stage. (Metroplex Ex. 1, ¶ 52; Tr. 430) WHYI broadcast an unspecified amount of promotional programming relating to Calle Ocho and related events. (Metroplex Ex. 1, ¶ 52; Metroplex Ex. 54, pp. 3-4)

77. *Broward County Fair* - WHYI supported the Broward County Fair, held November 20-30, 1986, by an unspecified number of announcements and discussion on the air. (Metroplex Ex. 1, ¶ 53) WHYI also sponsored a concert by a recording artist, Jack Wagner, at the 1986 Fair. Wagner was selected and paid for by the Fair. WHYI provided an unspecified number of announcements promoting the concert. WHYI also provided advice concerning the Fair's concert program. (Metroplex Ex. 43, p. 3; Tr. 4220-21)

78. WHYI also participated along with the Fair and Pepsi-Cola Corporation in a give-away used to promote the Fair. WHYI was responsible for promoting and managing the contest. The details of the contest were printed on 8,000,000 Pepsi cans. The Fair used only one radio station and one television station in connection with this promotion. Winners were given an evening cruise and a Y-100 party night was held, attended by a station representative. (Metroplex Ex. 43, pp. 3-4; Tr. 4214-16)

79. WHYI also maintained a booth at the Fair for the duration of the event. The booth, which bore the WHYI logo, was staffed by station personalities who gave away prizes and played music. (Metroplex Ex. 43, pp. 3-4; Tr. 431, 4215)

80. *Hispanic Heritage Festival* - During November 1986 WHYI supported the Hispanic Heritage Festival, a month-long series of cultural activities, with an unspecified number of PSAs and visits of unspecified number by WHYI staff and vehicles. (Metroplex Ex. 1, ¶ 54)

81. *Super Pig Bowl* - WHYI was involved in the February 1986 Super Pig Bowl, a football game between the Broward County Sheriff's office and the Miami Police Department. This event had as its purpose the raising of funds for charity and creating a positive image of police. (Metroplex Ex. 1, ¶ 57; Metroplex Ex. 42, p. 2) WHYI broadcast an unspecified number of promotional announcements for the event, including interviews with participants and call-ins from members of the public encouraged by giving away prizes such as tee shirts and tickets. The station's staff also produced a "rap" record, the "Pig Bowl Shuffle" which was played on the air. On the day of the event, attended by about 10,000 people, WHYI provided musical entertainment, taped all music needed for the show, and synchronized it with the event. (Metroplex Ex. 42, p. 5; Tr. 4002-04) WHYI also broadcast an unspecified number of crime tips and press releases issued by the Sheriff's office and donated to a conference sponsored by it. (Metroplex Ex. 42, pp. 6-7)

82. *Auto Races* - WHYI was involved with the Miami Grand Prix and Nissan Indy Challenge auto races, sponsored by Miami Motorsports, Inc. (Motorsports). (Metroplex Ex. 1, ¶ 60; Metroplex Ex. 44) Motorsports, a for-profit corporation, devotes some of its profits to charity and engages in some charitable activities. (Tr. 4063-66) WHYI provided an unspecified amount of promotional programming for the auto races. (Metroplex Ex. 1, ¶ 60; Metroplex Ex. 44, pp. 3-4) WHYI and its personalities have participated in Motorsports' charitable events. (Metroplex Ex. 44, p. 3) In connection with the Grand Prix, Motorsports bought commercial time in addition to receiving free time from WHYI to promote its involvement in the event. (Tr. 4065-66) WHYI purchased a hospitality suite along the route of the race for \$4,000. Such suites are typically used by corporations to entertain people with whom they do business. (Tr. 4052-56) During the race, WHYI broadcast an unspecified amount of information concerning traffic conditions and gave away tickets and prizes to listeners. (Metroplex Ex. 1, ¶ 60)

83. *Ft. Lauderdale Street Dance* - WHYI broadcast an unspecified number of PSAs on behalf of the annual Ft. Lauderdale Street Dance, a city event designed as the city's birthday party. It also maintained a stage at the event. (Metroplex Ex. 1, ¶ 61; Metroplex Ex. 39, p. 3)

84. WHYI supported the following community activities with PSAs and/or air discussion: local arts and cultural activities such as the Coconut Grove Playhouse Young

Actors Workshop; Model City Cultural Arts Center; City of Lauderdale Arts and Cultural Festival, and the Hollywood Playhouse. (Metroplex Ex. 1, ¶ 62) WHYI provided unspecified "on-air and off-air support" to the Metro-Miami Action Plan and the South Florida Black Media Coalition. (Metroplex Ex. 1, ¶ 55)

85. *Highway Helper Program* - WHYI co-sponsored with American Motors dealers, 7-Eleven stores and Bell South Mobility a program whereby a jeep would drive around assisting stranded motorists. (Metroplex Ex. 1, ¶ 101) American Motors provided the jeep, 7-Eleven provided gas coupons for enough gas to get off the road and Bell South Mobility provided a cellular telephone to call in problems. WHYI provided two employees to drive the jeep for 4 to 8 hours per day. (Tr. 503-04)

86. As noted, *supra*, WHYI vans were sent to a number of charitable and community events. The most prominent van was the "Live Y'er." (Metroplex Ex. 1, ¶ 72) It has the station logo. (Tr. 398-99) The van contained a sound system and equipment to do a simulated or actual remote broadcast. The vans contained WHYI promotional items such as tee shirts and bumper stickers, as well as record albums and cassettes to be given away to those attending the events. (Metroplex Ex. 1, ¶ 72)

87. *Miami Lakes Technical Education Center* - WHYI supported the Miami Lakes Technical Education Center, a part of the Dade County Public School System, which conducts a radio broadcasting course and participates in the operation of noncommercial FM radio station WLRN to train students. (Tr. 33-34) During the renewal period WHYI broadcast an unspecified number of spot announcements for the Center, and WHYI staff members visited the Center to speak to the students about broadcasting. The station also hosted a visit by the students to WHYI. Ross served on the Center's advisory board and he, together with individuals from four other local stations, provided expertise to the program. (Tr. 4144-45) During 1986 WHYI employed two of the Center's graduates. (Metroplex Ex. 1, ¶¶ 65-66; Metroplex Ex. 55, ¶¶ 3-8; Tr. 4132-33, 4143-44)

#### (4) WHYI's Promotional Policies

88. In 1986, WHYI had a budget for station promotion of \$756,000, including a prize budget of \$234,000. (Tr. 601) This budget was for all station promotional activities, not specifically those related to charities and community service activities, although prizes given away at such events were part of the promotion budget. (Tr. 630) Decisions concerning involvement in charitable and community activities were made at WHYI promotion meetings or by the promotion staff. (Tr. 597-98)

89. WHYI placed significant value on getting its name known in the community. (Tr. 440) Ross explained that ratings are won by the fives and tens and not by the hundreds and thousands and hence exposure was of benefit both to the station and to its disc jockeys personally. (Tr. 586) The station encouraged its personalities to make public appearances as often as possible at events, not only of a charitable or community nature. (Tr. 439-40) Such appearances were viewed as part of their jobs. (Tr. 584-86)

90. The station also relied on contests to promote itself. Promotional contests unrelated to charitable or community service activities were ongoing virtually all the time. (Tr. 432-33) A contest was held in 1987 called "Expose the Y." This contest awarded a grand prize of \$25,000 to

the listener who displayed the station's logo in the most original way, subject only to the limitation that no immoral or illegal acts would be considered. The winner was an individual who jumped on stage during a concert of the Miami Philharmonic Orchestra wearing an overcoat which he opened to display the station's logo. Ross did not know, and had not inquired, whether the individual had the Miami Philharmonic's permission to do so. He would have been denied his prize only if he had been arrested. (Tr. 440-44)

91. Ross also has a philosophy of assisting station advertisers during off periods in their business. For instance, if the hotel industry wished to promote lower rates during the slow month of August, Ross would support them with lower rates or other promotional assistance because "they're there for me other times of the year." (Tr. 591-92) Ross served as a director of the Broward County Chapter of the Florida Entertainment and Dining Association (FEDA), a trade association that addresses all issues of concern to the industry. (Metroplex Ex. 53, p. 2) Ross characterized FEDA as "an organization of local restaurant and night club owners designed to promote responsible drinking and to combat drunk driving." (Metroplex Ex. 1, ¶ 73)

#### (5) WHYI Donations

92. WHYI, at various times in 1986, made donations of money, albums, photographs, toys, disc jockey and van appearances, concert tickets and other items to local charitable events and organizations. WHYI donated a portable television set as a door prize for the Big Brothers/Big Sisters of Greater Miami, Inc. Black Leadership Breakfast in November 1986. (Metroplex Ex. 1, ¶ 75, att. 18)

#### (6) Testimony of Members of the Public

93. Testimony was given by 23 public witnesses from governmental, charitable, civic, and business organizations in the Ft. Lauderdale/Miami area (Metroplex Exs. 34-56):

94. *Betty Lou Randolph*, Chapter Director of the South Florida Chapter of the March of Dimes, commended WHYI for its sponsorship of the March of Dimes Walkathon fundraisers, discussed, *supra*. She expressed appreciation for WHYI's efforts, stating that WHYI "becomes a very part of the event on which it is working and inspires other people to do the same thing." (Metroplex Ex. 34)

95. *Jolae Brocato*, a Chemical Dependency Counselor with Spectrum Programs, Inc., a substance abuse program in Miami, praised WHYI's efforts to address South Florida's drug abuse problem through the station's "Here's Help" program and PSAs. Calling drug abuse one of the area's most serious social problems, Brocato commended WHYI "for its openness, sensitivity, and effectiveness in dealing with this critical need of our society." (Metroplex Ex. 35; Tr. 3847-54)

96. *Salvatore Charles Zocco*, Assistant Program Director at Here's Help, Inc., a nonprofit drug treatment program, described WHYI as "one of our major sources of support," not only for broadcasting the "Here's Help" program, which he produced, but for on-air fundraising assistance and on-site logistical support for the organization's activities. (Metroplex Ex. 36)

97. *Gregory Birkhimer*, Program Coordinator for the Muscular Dystrophy Association (MDA), classified WHYI as a "major contributor to the success" of the South

Florida activities in connection with the Jerry Lewis National Labor Day Telethon for the MDA. Birkhimer cited WHYI's promotional support for the event, the participation of its staff in the telethon, its broadcast reports of the event, and its donation of equipment. He lauded WHYI for airing PSAs and reporting a significant news development about muscular dystrophy research. (Metroplex Ex. 37)

98. *Rick Englert*, Executive Director of Ft. Lauderdale Youth for Christ, Inc., commended WHYI for its support for the youth guidance program of his organization. Noting that WHYI "has a reputation for following through on its assistance to" charitable events, he expressed the view that WHYI's sponsorship had significantly increased attendance at the organization's events. He was laudatory of the station's responsiveness and cooperation. (Metroplex Ex. 38)

99. *Stephen C. Person*, Superintendent of Recreation for the City of Ft. Lauderdale, testified that during the renewal period WHYI "provided numerous valuable services to the City." He described the station's involvement in Winterfest, the Spring Break Games, and the annual Ft. Lauderdale Street Dance, opining that WHYI's reputation was that "it is always there when we need help." (Metroplex Ex. 38; Tr. 3919-22)

100. *Ina Lee*, President of Winterfest, praised the station for its on-air and off-air support of both Winterfest, an important civic event each year in Ft. Lauderdale, and the Spring Break Games. Lee characterized Y-100's services to Winterfest as extraordinary, going beyond the call of duty. (Metroplex Ex. 40; Tr. 3993)

101. *Kimary DeLaunay*, Adoption Counselor for the Humane Society of Broward County, testified that WHYI was an invaluable resource in enabling the Humane Society to educate the public about the availability of pets for adoption and finding homes for orphaned pets. She described the public response to her broadcasts on WHYI as "dramatic." (Metroplex Ex. 41)

102. *Elaine Miceli*, Community Involvement Specialist for the Broward County Sheriff's Office, commended WHYI for its promotional support of the "Super Pig Bowl" football game to raise funds for five different charities. She lauded the station for its concern in helping young people avoid drug abuse, saying "Y-100 has communicated a very clear message to young individuals who may have been on the verge of taking the wrong step with drugs." (Metroplex Ex. 42)

103. *Johnny F. Hudson*, Vice President of the Broward County Fair, testified that WHYI had done a "fantastic job" for the Fair and that the station's support had been "vital." He expressed the view that the station's promotional efforts and presence at the Fair helped to promote interest in the Fair and attract visitors. He described WHYI as very open and honest and as more accessible to him than any radio station in the market. (Metroplex Ex. 43; Tr. 4219)

104. *Robert A. Wild*, Marketing Director of Miami Motor Sports, Inc./Miami Indy, Inc., lauded WHYI for its promotional support of Miami's international car race to benefit several local and national charities and to increase tourism. (Metroplex Ex. 44)

105. *Marvin Hertz*, a Coordinator for the Greater Miami Heart Association, commended WHYI for its presence and participation in Heart Association's "Jump Rope for Heart" competition, designed to publicize the Associ-

ation's activities. Hertz was impressed by WHYI's cooperativeness, accessibility, and willingness to aid a charitable organization. (Metroplex Ex. 45)

106. *Denise Danches - Fisher*, a Program Coordinator for the American Lung Association, commended WHYI for its broadcast of announcements encouraging the public to participate in the organization's Christmas Seals fundraising promotion. (Metroplex Ex. 46)

107. *Lee David Zimmerman*, Public Relations Manager for the Coconut Grove Playhouse, expressed appreciation that WHYI had devoted two "Y's Rap" programs to interviews of Playhouse officials about that organization's educational activities and the demand for cultural activities in South Florida. (Metroplex Ex. 47)

108. *John W. Shaw*, an official of the Dade County Board of Education, described WHYI's participation in the 1986 Job Fair, expressing the view that the station had been extremely cooperative and supportive of the goals of the fair. (Metroplex Ex. 48)

109. *Alina E. Becker*, Director of Program Development of the Cuban American National Council, related that WHYI had participated in her organization's 1986 Career Opportunity Day Conference designed to inform and motivate low-income youths about possible career opportunities. She opined that, because WHYI is a popular radio station with young people, its involvement fostered a positive attitude in the students toward the program and helped make it a success. (Metroplex Ex. 49)

110. *Robin Peter E. Gutmann*, Inspector/Public Education Specialist with the Hollywood Fire and Rescue Department, commended WHYI for addressing significant fire prevention issues in its public affairs programming, noting that juvenile fire setting is a pressing problem in Broward County. (Tr. 4112-13) He stated that the format and style of the program was extremely effective in enabling the Department to communicate public safety information. He expressed appreciation that an entire "Y's Rap" program was devoted to his department, which enabled him to address a number of issues relating to fire prevention. He felt the program was successful based on the responses he received. (Metroplex Ex. 50)

111. *Michael Bell*, vice president of a Ft. Lauderdale advertising agency, testified that WHYI was very helpful in broadcasting PSAs for a United Negro College Fund fundraiser and publicizing Ronald McDonald House fundraisers and the Broward Sheriff's Office Youth Explorer recruitment effort. (Metroplex Ex. 51)

112. *Howard Cawein*, Executive Director of the Daily Bread Community Food Bank, commended WHYI for publicizing the activities of his organization through public affairs program discussion and informational announcements. He said that the station "is receptive to our requests and bends over backwards to help us." (Metroplex Ex. 52, ¶ 2)

113. *Mary Fanizzi*, National Promotions Director of Showplace, Inc., which operates Penrod's on the Beach in Miami, testified that "if there's a cause to be served, Y-100 will be there serving it." She cited the station's campaign against drunk driving. (Metroplex Ex. 53)

114. *Rafael V. Licea*, Executive Director of the Carnival Miami Project of the Kiwanis Club of Little Havana, praised WHYI for serving as a bridge between the Hispanic community and the Anglo and Black communities at the Carnival Miami festival, an Hispanic festival whose purpose is to bring together the three major cultural

groups and promote mutual understanding. He cited the station's promotional announcements for Carnival events, including the Calle Ocho Open House, and its presence at the festival, which drew many Black and Anglo visitors. (Metroplex Ex. 54)

115. *Bob Gaynor*, Radio Broadcasting Instructor at the Miami Lakes Technical Education Center commended WHYI for its support of the Job Fair and the radio broadcasting instruction program run by the Center. (Metroplex Ex. 55)

116. *Anita Allbright*, Development Resource Specialist for Partners for Youth, credited WHYI for having played an active role in making her organization's Summer Jobs for Youth '86 campaign a success. She cited WHYI's participation in planning the program, its on-air promotional support for the program, and its on-site presence at job registration sessions, which, she felt, made the experience more appealing and positive for the youth. (Metroplex Ex. 56)

#### (7) Letters of Appreciation

117. During the renewal term, WHYI received letters from more than 90 local charitable, educational, governmental, religious, and community service organizations expressing their positive reaction to WHYI's programming, public service activities, and donations. (Metroplex Ex. 1, ¶ 76 and att. 18) In addition, WHYI received numerous favorable letters from individuals responding to the station's service to the public. (Metroplex Ex. 1, ¶¶ 87-88; att. 23, 2; att. 26; att. 36)

118. Lastly, the record contains no evidence of any regulatory violations by WHYI during the renewal term.

#### C. Southeast Florida Broadcasting Limited Partnership (Southeast)

##### (1) Ownership Structure

119. Southeast is a limited partnership organized under the laws of Delaware and registered to do business in Florida. Southeast's ownership structure is as follows (Southeast Ex. 1):

Name	Status	Equity
CMNY Capital,	L.P. Limited Partner	24.0%
Bernard L. Perry	Limited Partner	12.0
Alan J. Courtney	Limited Partner	12.0
Arthur B. Baer	Limited Partner	10.8
Richard A. Levin	Limited Partner	10.8
Melvin L. Katten	Limited Partner	6.0
Louis A. Holland	Limited Partner	6.0
Kenneth S. Grossman	Limited Partner	6.0
Gerald B. Cohen	Limited Partner	6.0
Gloria R. Butler	General Partner	4.0
Joan Baer	Limited Partner	2.4

120. The Certificate and Limited Partnership Agreement of Southeast (the Agreement) provides at Section 10 in pertinent part that (Southeast Ex. 12):

Except as expressly stated herein, all decisions of the Partnership shall be made by the General Partner, and the Limited Partners shall not participate in the management of the Partnership affairs.

121. Section 13(a) of the Agreement provides in pertinent part:

No Limited Partner shall participate in the control of the Partnership business or have any power to bind the Partnership in any contract, agreement, compromise or undertaking; . . .

122. Section 13(e) provides:

No Limited Partner shall act as an employee, agent, contractor of [sic] consultant of the Partnership in connection with the Partnership's media enterprises nor shall any Limited Partner communicate with the General Partner or the Partnership on matters pertaining to the day-to-day operations of any media enterprise.

123. Pursuant to Section 22 of the Agreement, the Limited Partners may vote to remove the General Partner only in the event of the institution of bankruptcy proceedings against the General Partner; in the event the General Partner is adjudicated a bankrupt or insolvent; or an adjudication of incompetence of the General Partner by a court of competent jurisdiction. (Southeast Ex. 12, p. 16) The only circumstances in which limited partners may vote are on questions of the dissolution or winding up of the partnership; the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the partnership assets other than in the ordinary course of business; a change in the nature of the business; or the removal of the General Partner pursuant to Section 22. (Southeast Ex. 12, pp. 11-12)

## (2) *Integration of Ownership and Management*

### (a) *Southeast's Integration Proposal*

124. Gloria R. Butler (Butler), Southeast's General Partner, will devote forty (40) hours per week to the day-to-day operation of Southeast's proposed station as its General Partner. She will ordinarily work at the station Monday through Friday, but work Saturday and Sunday if her duties require. She will direct the operation of the station, including establishing and implementing policies, hiring and firing, and supervising personnel. She will oversee programming, technical operations, sales and accounting, and will be responsible for administering the Equal Employment Opportunity Program. (Southeast Ex. 2, p. 4)

125. Butler is a Black female. She has resided in Coral Springs, Florida, which is within the proposed city grade contour of Southeast's proposed station, since 1982. (Southeast Ex. 2, pp. 1-4)

126. Butler was born in Grambling, Louisiana, and graduated from high school in Grambling. She received a BS degree from Grambling College in 1962. Upon graduation from college, she became a teacher and served in various teaching capacities until 1982, when she and her husband moved to Coral Springs where through a corporation, Cherikel, Inc., they became the franchisee for a McDonald's restaurant located in Pompano Beach. She is a 48 percent stockholder, Vice President, Treasurer, and Director of Cherikel, Inc. Her husband is a 52 percent stockholder, President, and a Director of the corporation. (Southeast Ex. 2, p. 1; Tr. 1409)

127. In 1984, Butler and her husband organized Wilenca, Inc., which is the franchisee for a McDonald's restaurant located in Ft. Lauderdale, Florida. She and her

husband hold identical ownership and offices in both corporations. Since May 1987, Wilenca corporation also has operated a second McDonald's restaurant in Ft. Lauderdale. (Southeast Ex. 2, p. 2)

128. Butler has engaged in civic activities within the service area of Southeast's proposed station. One facet of her duties at Cherikel and Wilenca is to assist nonprofit organizations in raising funds. She was involved in arranging for a hot cakes dinner in 1984 which helped raise funds to send a local school girl to the Olympic Training Center in Colorado Springs. In 1985, she was involved in raising funds for an elementary school in Pompano Beach through another hot cakes dinner. Since 1984 she has been actively involved in the Partners in Excellence Program in a local elementary school, where she served as a volunteer math teacher. (Southeast Ex. 2, p. 2)

129. Since 1982, she has participated in volunteer activities in the elementary school attended by her children. She chaperoned field trips and helped teach reading. She also participated in the annual career day activities of the Broward County School Board. She received a letter of appreciation thanking her for her assistance. (Southeast Ex. 2, p. 3) She also received a Certificate of Appreciation in 1986 from the staff and students at Alphabet and Forest Academy. This was awarded for her volunteering with the book fair. In 1985 and 1986, she participated as a judge in the oratorical contest sponsored by the Sistrunk Historical Festival Oratorical Committee. She also assisted in fundraising by making a corporate donation and helping secure other donations from businesses in the area. In 1986 she participated in a celebration of Black History Month at a local elementary school. Since 1983, she has been a member of the Markham Elementary School Advisory Committee. Since 1982, she has been a member of Coral Springs High School PTA. Commencing in 1982, she was a member of the Coral Springs Elementary School PTA. Commencing in 1985, she was a member of the Coral Springs Middle School PTA. (Southeast Ex. 2, p. 3)

130. For the 1984 and 1985 school year she was a member of the North Area Advisory Council for Schools in the Northern Section of Broward County. She also served on the textbook selection committee in 1985 for Broward County social studies textbooks. (Southeast Ex. 2, p. 4)

131. In the event Southeast is successful in this proceeding, Butler proposes to relinquish all of her day-to-day activities at Cherikel and Wilenca, the McDonald franchises. She averred that she would no longer be involved on a day-to-day basis in the management of either company. (Southeast Ex. 2, p. 4)

132. Butler acknowledged that she has no background in broadcast communications; has never worked at a broadcast station; has never attended a broadcast convention or seminar; has never subscribed to any broadcast trade journals, and has never reviewed any broadcast periodicals or literature. (Tr. 1412) Except for one visit to a radio station in 1983 to produce a commercial, she has never been inside a broadcast station. (Tr. 1505)

### (b) *History re Initiation and Formation of Southeast*

133. *Initiation of Project By Counsel* - The communications law firm of Cohen & Berfield has, for over 20 years, represented Bernard L. Perry (Perry) a limited partner, in communications matters. (Tr. 2419-22) Perry has retained

Cohen & Berfield for legal representation of his broadcast and cable television interests and has encouraged the firm to bring to his attention investment opportunities in the communications field. (Tr. 2433)

134. In the spring of 1986, Morton L. Berfield (Berfield), a partner of the law firm, informed Perry of an opportunity to invest in a venture that the law firm was "attempting to put together" to apply for the license of WHYI. (Tr. 2432-33) Perry understood that he was the first prospective investor Berfield contacted, and that if the project went forward Cohen & Berfield would represent the venture. (Tr. 2433-34) In a follow-up conversation, Berfield told Perry that his firm would find someone to manage the station, an individual who was a minority local resident, since, as Berfield advised, such attributes would be "a plus" to the Commission. (Tr. 2440-41)

135. Perry, in turn, recruited two other investors, Arthur B. Baer (Baer) and Alan J. Courtney (Courtney). (Tr. 2435-36, 2634-35, 4325-28) Courtney was Perry's friend and neighbor in Palm Beach, Florida. (Tr. 4322-23) Then either Perry or Baer enlisted Robert L. Davidoff, one of three equal general partners of CMNY, a small business investment company (SBIC). (Tr. 2435-36, 2637-38, 2826-28, 2854-67, 3311) During their initial conversations, Messrs. Perry, Courtney, Baer, and Davidoff (on behalf of CMNY), hereinafter referred to as the Perry group, agreed that, as a group, they would take 75% of the enterprise, with Perry and Courtney each being given half of his share (*i.e.*, 6%) as a "promotional interest" or "finder's fee" in return for Perry's "bringing the parties together" and "acting as . . . an investigator and helping to organize it initially." (Tr. 2443-44, 2452, 2637-38, 3312-13) They understood that Cohen & Berfield would find other investors to take the remaining 25%. (Tr. 2443-44)

136. Messrs. Perry, Courtney, Baer, and Davidoff had a pre-existing relationship in connection with Leisure Market Radio, Inc. (LMRI) and Stations WADK(AM), Newport, Rhode Island, WIVI, St. Croix, U.S. Virgin Islands, and WOTB(FM), Middletown, Rhode Island. Perry was introduced in 1984 or 1985 to Baer by a mutual friend for the purpose of interesting Perry in investing in SMRI, which owned WOTB and WIVI. Baer's SBIC, Unicorn Group, was an investor in LMRI and Baer was a director and officer in the company and its licensee subsidiaries. At about the same time, Perry was introduced to Davidoff, whose SBIC, CMNY, had been interested in investing in LMRI by Baer. (Tr. 2630-32, 2828-40) Baer and Davidoff were personal friends, having known each other since 1981 or 1982 as a result of a joint investment by their companies. (Tr. 2631-34) Through Baer's efforts, Perry subsequently became Acting President and a consultant to LMRI. Perry and Courtney purchased WADK, and later they purchased WOTB from LMRI. Funds for operation of both stations were advanced by CMNY and Unicorn. (Tr. 2428-29) The two SBIC's are currently negotiating with Perry to purchase interests in his licensee companies. (Tr. 2631-34)

137. Baer is a general partner of two SBIC's known collectively as the "Unicorn Group" or "Unicorn." (Tr. 2623-26) Initially, Baer contemplated that Unicorn would invest in the WHYI venture. (Tr. 3309-10, 3346-47; Metroplex Exs. 25, 26) However, Unicorn eventually decided that the project was not suitable for a small business investment company because it was "a straight bet on a lawsuit." (Metroplex Ex. 27) As noted, *infra*, Baer decided

to invest in the project personally and to split the interest reserved for Unicorn with his wife, Joan N. Baer, and his close friend and attorney, Richard A. Levin, who had been investing with him for at least 15 years. (Tr. 3356-62)

138. Cohen & Berfield proceeded to find investors for the remaining 25%. Lewis I. Cohen (Cohen), another partner of the law firm, recruited Louis A. Holland (Holland), whom Cohen had previously recruited to be a principal of license renewal challengers represented by Cohen & Berfield for stations in Chicago and Los Angeles. (Tr. 3581-82, 3586-91) Cohen also enlisted Melvin L. Katten (Katten), a Chicago attorney and a close friend, whom he had known for 15 years and whom he had also previously recruited to be a principal of the Chicago and Los Angeles renewal challengers. (Tr. 4264-75) Holland, in turn, enlisted his friend and business partner, Kenneth S. Grossman (Grossman). (Tr. 3580, 3582-85) Lastly, Grossman recruited his long-time close friend Gerald B. Cohen.<sup>8</sup> (Tr. 3408, 3417-18, 3436-37) After conferring with Cohen & Berfield, Messrs. Holland, Katten, Grossman, and Gerald B. Cohen, hereafter referred to as the Chicago Group, decided in May 1986 to divide the remaining 25% interest in the venture equally among themselves. (Metroplex Ex. 85, pp. 12-15, Tr. 3591-93, 4273-74)

139. With the group in place, counsel Cohen proposed that a limited partnership be created, and he drafted a limited partnership agreement. (Tr. 2448-49; Metroplex Ex. 22) The draft agreement provided for a general partner with a 4% "carried" (*i.e.*, free) interest and for a division of equity previously suggested by Perry and agreed upon by Messrs. Perry, Baer, and Davidoff. (Tr. 2870-81, 2883-84; Metroplex Ex. 22) Cohen, by letter dated May 13, 1986, sent the draft limited partnership agreement to Messrs. Perry, Courtney, Davidoff, Baer, Holland, and Katten. As detailed, *infra*, Butler had not agreed to participate at this time.

140. *The May 16, 1986, Meeting in New York* - On May 16, 1986, attorneys Cohen and Berfield met in New York with Perry, Baer, and Davidoff to discuss the venture. One purpose of the meeting was to introduce counsel to Davidoff and Baer to "see whether the chemistry was going to be right." The participants discussed the form of the partnership structure and the need for a "very strong general partner." They also discussed other aspects of the venture, including financing and the fee arrangement for Cohen & Berfield. It was agreed that counsel would receive a "retainer" capped at \$200,000. (Tr. 2453-54, 2939, 3108-09) Counsel told them that after they advanced the first \$50,000 of the \$200,000 total, the limited partners could abort the venture and cut their risk if counsel decided it was not viable to go forward. (Tr. 2924-28) The prospective partners may have been told at the meeting that Cohen & Berfield would get a \$500,000 bonus if Southeast's application was granted, but Perry is not certain. (Tr. 2455)

141. In response to Baer's "great concern" that the investment was speculative and his inquiry whether there "may be some salvage to our money" if they didn't win the license, counsel told the investors at the meeting that the firm had represented renewal challengers in the past and that some of their efforts had been "successful." Counsel defined success as winning the license or "an arrangement for a financial settlement" in excess of what had "actually been expended." (Tr. 3339-40) Cohen stated

that the value of the WHYI license was about \$20 million. (Tr. 2454-55) He explained that there were "intermediate outcomes short of winning the license," including a buy-out of Southeast and a discounted purchase of WHYI. Baer recalled that counsel had explained that acceptance of such a settlement offer would be subject to a vote in which the limited partners could participate. (Tr. 3341-43) In response to repeated questions, the attorneys expressed "a strong feeling" that "we had a strong case" and that the investors "wouldn't lose money on it and we should make the investment." (Tr. 3343-44)

142. The investors agreed at the May 16 meeting that Davidoff's firm, CMNY, would provide a loan letter for the applicant. Cohen proposed that the letter be in the amount of \$600,000, and the investors agreed to that amount. It was understood that Cohen & Berfield would draft a loan letter "suitable for FCC purposes." (Tr. 2463-64)

143. At the May 16 meeting with Perry, Baer and Davidoff, Cohen recommended that Southeast have one general partner, who would receive about 4% of the equity as a "carried interest" or "sweat equity." (Tr. 2456-57, 2484) There was discussion to the effect that local residence and minority status would be desirable prerequisites for the general partner because those factors would earn preferences for Southeast's application. (Tr. 2440-41, 3318, 3320) As detailed, *infra*, Cohen had preliminarily contacted Gloria Butler in early May and arranged to meet and discuss the venture with her on May 20 in Miami. (Metroplex Ex. 21; Tr. 2017-20) Those present were told that she was Black. They authorized Cohen to proceed with the May 20 interview and "recommend yes or no as to whether we should go forward, and ourselves, interview the applicant." (Tr. 2458-59, 3317-18) Perry and Davidoff had reviewed a resume that Butler had sent to Cohen on May 5, which reflected no experience in communications. (Tr. 2459-60; Metroplex Exs. 14, 22) Nobody present expressed concern about Butler's lack of broadcast experience. (Tr. 2461-62, 2921-22, 3319-20)

144. Baer summarized the discussion at the May 16 meeting and related conversations with Perry in a memorandum to his Unicorn colleagues. The memorandum stated, in pertinent part, as follows (Metroplex Ex. 25, pp. 1-2):

A law firm specializing in FCC matters (Cohen & Berfield) is representing a group of investors trying to obtain a radio station license. They will be applying in opposition to the present holding. The value of the license is believed to be about \$20 million.

Bernie Perry brought us into this deal and we are splitting the available percentage with CMNY. CMNY and the two Unicorns together will each put up \$62,500, or 31.25% of the case for 24% of the profits. The difference represents the promotions to the General Partner (4%) and to Perry (20%).

The attorneys are capping their fees at \$200,000. Any more, they bear. They feel that legal costs will run at least \$250,000, so they anticipate they are kicking in \$50,000 if the legal process runs its full course. Their cuts in the event of various outcomes are:

1. If we lose, they get nothing more.
2. If the case is settled for cash, the attorneys get a bonus of 15% of any funds above the capital contribution.
3. If the case is settled by the owners selling the license to us at some heavily discounted value, then the lawyers get \$250,000.
4. If we win the license, the attorneys get a bonus of \$500,000.

The attorneys advise us that winning takes a year at the FCC and two years in the appeals process.

The attorneys believe the case is very strong here. The present license holder lost an FCC trial last year and received only a one-year probabltional [sic] extension.

The attorneys will spend the first \$50,000 assembling evidence and interviewing witnesses. If at this stage the case looks weak, we can abort it there.

Their assessment is: "We're not saying this is a piece of cake, but it looks like there's a solid enough basis to mount a challenge. I can't imagine you could lose a nickel on this."

145. *The Retainer Agreement* - Based on the discussion at the May 16 meeting, Cohen & Berfield prepared a proposed retainer agreement and sent it on May 21, 1986, to Perry, Courtney, Davidoff, Baer, Gerald B. Cohen, Holland, Katten, and Grossman. As detailed, *infra*, Butler had not agreed to participate at this time (Metroplex Exs. 19, 20; Tr. 2058, 2489) The transmittal letter outlined the schedule of payment for the partnership's initial capital call and asked for the return of executed retainer agreements and checks made payable to Cohen & Berfield in the amounts specified. (Metroplex Ex. 20, pp. 1-2) The retainer agreement proposed that Cohen & Berfield perform legal services in connection with the preparation and prosecution of the Southeast application to an "absolutely final decision" or settlement. Payment for these services would be made in installments: up to \$50,000 for Phase I, including the preparation of a limited partnership agreement and the application and the conduct of "all necessary investigations;" up to \$150,000 for Phase II, including the prosecution of the application through the hearing and all appeals. Each investment unit would be required to pay 12.5% "now," 12.5% due thirty days after filing of the partnership papers, 25% due fifteen days after hearing designation, and the remaining 50% due as subsequent calls were made throughout the hearing process. In addition, a bonus arrangement for Cohen & Berfield was specified: 15% of a buy-out after return of capital contributions in consideration for dismissal of Southeast's application; \$500,000 if Southeast won the construction permit, to be paid when the grant became a final order, and \$250,000 in the event Southeast bought WHYI at a discount. The prospective partners were asked to sign and return the agreement. (Metroplex Ex. 19, p. 2) Soon after the retainer letter was distributed, some of the investors

signed and returned it to Cohen & Berfield with their initial capital contributions. The payments of Davidoff (May 28), Holland (May 30), Gerald B. Cohen (June 2), and Grossman (June 9), were received by Cohen & Berfield during the period May 28-June 9, 1986. The others followed during the period July 8-August 1, 1986. (Metroplex Ex. 92; Tr. 2950-51, 2969, 4371)

146. The partners have met their obligations to make financial contributions to the partnership as follows (Metroplex Ex. 75):

	Initial Call	30 Days After Limited Partnership Agreement Filed	15 Days After Designation	Subsequent Calls	Total Contribution
CMNY	\$7,812	\$7,814	\$15,625	\$31,250	\$62,500
Perry	1,562	1,563	3,125	6,250	12,500
Courtney	1,562	1,563	3,125	6,250	12,500
A. Baer	7,812	3,516	7,032	14,062	32,422
Levin	- 0 -	3,516	7,032	14,061	24,609
Katten	1,562	1,563	3,125	6,250	12,500
Holland	1,562	1,563	3,125	6,250	12,500
Grossman	1,562	1,563	3,125	6,250	12,500
G. Cohen	1,562	1,563	3,125	6,250	12,500
J. Baer	- 0 -	781	1,562	3,125	5,468
Butler	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
	\$24,996	\$25,004	\$50,001	\$99,998	\$199,999

147. *Recruitment of Butler by Counsel* - Cohen learned of Butler indirectly through Lee Dunham (Dunham), a McDonald's franchisee, who was one of his broadcast clients. Dunham had recommended another McDonald's franchisee in Miami named Valencia Nichols. When Cohen contacted Ms. Nichols, she was not interested; however, she suggested he call Butler, who was a friend of hers.

148. Cohen called Butler in early May 1986. He told her that a group was forming to apply for WHYI and that it needed a general partner. He explained that he would be the attorney for the group. (Tr. 2017-20) Butler told Cohen that she would think about it and get back to him. (Tr. 2019) On May 5, she sent him a resume that he had requested in a telephone conversation the previous week. As job experience, the resume listed elementary school teaching positions and involvement with McDonald's franchises. (Metroplex Ex. 14) On May 12 Cohen wrote Butler to confirm an interview meeting in Miami on May 20. (Tr. 2032; Metroplex Ex. 21) Before or at that meeting, Butler made clear to Cohen that she was not willing to invest any money in the WHYI venture "because I did not have money to invest in something other than the businesses we [she and her husband] were currently involved in." (Tr. 2033)

149. On May 20 Cohen interviewed Butler in Miami. He asked about her background, her present duties with the Butlers' business, and other "basic" questions. Butler asked Cohen about the others in the venture, and he told her that they were men of "substantial means" who were willing to commit if a general partner could be located.<sup>9</sup> (Tr. 2039-40) At the conclusion of the interview, Butler and Cohen agreed that Cohen would arrange a meeting with the "major investors," who she understood were Baer and Davidoff. (Tr. 2052-54)

150. On June 12, 1986, Butler traveled to New York for the June 13 meeting with the limited partners. Cohen's office arranged and paid for Butler's trip. All details were handled by the law firm, which prepaid her plane ticket,

made her hotel reservation, and told her how to get to the hotel from the airport. (Tr. 2072-73; Metroplex Exs. 20, 23, 24)<sup>10</sup>

151. *The June 13, 1986, Meeting in New York* - Present at the June 13 New York meeting were Cohen, Butler, Perry, and Davidoff.<sup>11</sup> This is the only occasion when any of Southeast's limited partners ever met Butler, except for a chance encounter she later had with Perry at the hearing. (Tr. 2078-79, 2226, 2247, 2253-54, 2285-86, 2504) The meeting lasted about three hours. (Tr. 2602) Perry and Davidoff interviewed Butler with regard to her background and history, including her McDonald's businesses. (Tr. 2115-16, 2501-02, 2973-75) There was no discussion of her knowledge of WHYI's operations, the staffing or format of the proposed station, or the station's transmitting facilities and how they would be obtained. (Tr. 2115-16) She was asked "generally" about her financial condition, but no effort was made to determine whether she could afford an investment in Southeast or whether she could sustain her liability as a general partner. (Tr. 2125-26, 2501-02) Butler learned at the meeting that Perry had a "radio interest in Connecticut." (Tr. 2079) She also gained a "general understanding" that "some of these people knew each other from previous relationships," but she had no understanding of the specifics of those relationships. (Tr. 2080- 81) She did not ask and was not told by Cohen until later how Perry, Baer, and Davidoff came to be involved in Southeast. (Tr. 2081-82) Butler was given a draft partnership Agreement that assigned her a 4% interest. Perry and Davidoff proposed this figure to her during the meeting. (Tr. 2107-09, 2497-98)

152. At the end of the interview, Cohen, Perry, and Davidoff met alone and discussed Butler's qualifications. (Tr. 2137, 2978) They then decided to offer her the position of general partner, and they reconvened with her to extend the offer. (Tr. 2136-37, 2497-98, 2978-80) Butler was asked to review the partnership and retainer agreements and, if she decided to accept the offer, sign and return them. Within two weeks of the June 13 meeting, she signed and returned the limited partnership agreement and the retainer agreement. (Tr. 2151-54)

153. Prior to signing the agreement, Butler sought advice from her personal counsel. (Tr. 2090) She understood from these discussions with her counsel that she had absolute liability for the debts of the partnership, except insofar as Section 20 of the Agreement protects her to the extent of the assets of the partnership. (Tr. 2141-42)

154. At no time did Butler propose any alternative to the arrangement offered to her. Nor did she suggest any changes in either the partnership agreement or the Cohen & Berfield retainer agreement. (Tr. 2140-41)

155. *Butler's Involvement In The Partnership Affairs* - As noted, *supra*, the structure of Southeast's financing, namely, the \$600,000 loan, was agreed to by Cohen and Davidoff prior to Butler's agreeing to join the partnership. On July 24, 1986, Cohen sent Davidoff a draft loan commitment letter identical to that ultimately relied upon by Southeast. (Metroplex Ex. 17, pp. 1, 2; Southeast Ex. 3, att. 3) A copy of the draft was sent to Perry, but not to Butler, who had become Southeast's general partner a month earlier. Cohen's transmittal letter instructed Davidoff that if the draft was acceptable he should have it retyped on CMNY letterhead, signed, and returned to Cohen. (Metroplex Ex. 17, p. 1) Davidoff signed the CMNY loan commitment letter, addressed to Butler, on July 28. (Metroplex Ex. 16, p. 2) Butler, who offered no

suggestions for changes in the loan letter, had no understanding why Cohen originally sent a draft to Perry but not to her. (Tr. 2233, 2236-38)

156. Paragraph 12 of the partnership agreement requires the prior written consent of both Butler, as general partner, and Southeast's counsel for transfers of limited partnership interests. (Southeast Ex. 12, p. 8; Tr. 2248-49)<sup>12</sup> By letter dated July 11, 1986, Baer notified counsel that he wished to transfer portions of his interest to Joan Baer, his wife, and Richard Levin (Levin). (Tr. 2257-58) Without consulting with Butler, counsel told Baer that the proposed transfer would be fine, and he promised to circulate papers formalizing the split. (Tr. 3361-62) Baer gave counsel only general background information about the employment status of the new investors and told him nothing of their financial condition. (Tr. 3376-78) The transfer of interests was effectuated in August 1986. (Tr. 3379-80; Metroplex Ex. 30) Butler did not know why Baer was making the transfer and knew nothing about it except what Cohen told her; namely, that Baer "transferred a portion to his wife and best friend . . ." (Tr. 2252) While she understood that Mrs. Baer and Levin were assuming Baer's obligations with respect to the transferred interest, she knows nothing about the financial qualifications or net worth of either of them. (Tr. 2253-55) She did not recall receiving notification in writing of the proposed transfer from Baer, nor did she know whether the other partners were notified or even whether the partnership agreement requires notification.<sup>13</sup> (Tr. 2255-56) Similarly, Davidoff could not recall that CMNY notified Butler of its conversion from a corporation to a limited partnership on December 31, 1986, even though Davidoff conceded that such notification was required. (Tr. 2830-32)

157. The first partnership capital call, pursuant to paragraph 7(a) of the partnership agreement, was made by counsel in his May 21, 1986, letter forwarding the retainer agreement. The monies were paid in to counsel's office. Subsequent calls under subparagraphs 7(b)-(e) were made by letters prepared in counsel's office and mailed to Butler for signature and distribution. All calls were precipitated by counsel's legal bills, except the last call in July 1987, which was made in response to counsel's advice that full payment of the \$200,000 total capital contribution would aid Southeast in defending against a petition to enlarge issues as to Southeast's financial qualifications. (Tr. 2241-44)

158. Butler set up Southeast's bank account and transferred approximately \$198,000 of the \$200,000 contributed by the limited partners to counsel pursuant to the retainer agreement for legal fees and prosecution-related expenses, such as consultant fees and travel costs. (Tr. 2259-60, 2279-80, 2285) Butler had "no voice" with respect to this money. (Tr. 2259) She has reimbursed herself out of partnership funds for "small purchases," including postage and Federal Express charges, drawing on the approximate \$2,000 balance left in the Southeast bank account on counsel's advice to cover "incidental expenses." Butler has probably spent less than \$1,000 on behalf of the partnership. (Tr. 2258-60)

159. Butler explained that she has never called a partnership meeting pursuant to paragraph 19 of the agreement (Tr. 2247; Southeast Ex. 12, p. 14), because "[t]here is no business being conducted at this time or no developments that have warranted a meeting." (Tr. 2285-86)

160. Butler hired and supervised Southeast's accountant. She spoke to about 20 community leaders in connection with the preparations of Southeast's application. (Tr. 2281-82) She taped programming of WHYI. (Tr. 2280) She has prepared an annual report and accounting documents required by the agreement. (Tr. 2282) She drafted the programming and EEO portions of the application. (Tr. 2266)

161. *Butler's Participation In The Operation of the Proposed Station* - The partnership agreement provides that "the General Partner shall . . . be employed at the station . . . in a full-time management position." (Southeast Ex. 12, p. 8) The "Statement Re Integration Proposal," submitted in response to the Presiding Judge's *Order* (FCC 87M-684), released March 27, 1987, represented that Mrs. Butler, "the General Partner of Southeast Florida, proposes to be integrated into the day-to-day operation of the proposed station" on a full-time basis. (Metroplex Ex. 66)

162. The integration proposal further represented that Butler would "direct the operation of the station, including establishing and implementing policies, hiring and firing and supervising personnel." Also, she would oversee programming, technical operations, sales and accounting, and be responsible for the EEO program. (Metroplex Ex. 66)

163. Butler, in her written direct testimony, also represented that as general partner she would direct the operation of the station and listed the same functions as set forth in the integration statement. (Southeast Ex. 2, p. 4) Neither Southeast's limited partnership agreement (Southeast Ex. 12), nor Southeast's "Statement Re Integration Proposal" filed April 6, 1987 (Metroplex Ex. 66), nor Butler's written direct testimony (Southeast Ex. 2) specified what managerial position she would hold at the station. When asked at the hearing whether the proposed station would have a General Manager, she responded that she would function as the General Manager. (Tr. 1471-72) However, she could not explain why that position was not specified in Southeast's partnership agreement, the integration statement, or her written direct testimony. (Tr. 1473-74, 1477-79) Butler has never discussed with counsel or her partners the salary that the General Manager would receive, and she has never attempted to ascertain what amount of compensation would be consistent with the compensation formula for the General Partner station managerial duties provided in paragraph 11 of the partnership agreement. (Tr. 1555-60, 2110; Southeast Ex. 12, p. 8) However, as noted, *infra*, she approved the operating budget which specified a yearly salary for the General Manager of \$75,000. (Southeast Ex. 3, att. 1, p. 2)

164. Perry, during his deposition, stated that at a meeting on September 14, 1987, among Lewis Cohen and members of the Perry Group (Baer, Davidoff, and himself), the investors had had "the same discussion we have had on and off: that she [Gloria Butler], as a general partner, would have complete management control, but she would appoint a general manager." Perry, at his deposition, made clear that Butler would not hold the position of General Manager on any basis. (Tr. 2471-75)

165. At the hearing, Perry claimed that he was "obviously wrong" at his deposition because the partnership agreement gives Butler "the right to manage the business. Whether she's called general manager or general partner is a moot point." (Tr. 2476) He conceded that counsel had brought this to his attention by reviewing the agree-

ment with him. (Tr. 2476-77) Later at the hearing, Perry acknowledged that "[w]e did have a discussion like that [on September 14, 1987], but obviously we were in error." (Tr. 2479)

166. According to Baer, the question of who would be General Manager "was discussed but it was never specifically settled upon." Either counsel or Perry told him that Butler might hold the position, but she might not. (Tr. 3400) Davidoff, when asked at his deposition who the General Manager would be, responded: "We have not made that decision yet." He confirmed that testimony at hearing. (Tr. 2981-82) He further testified at his deposition that the General Manager would not be selected until the license was awarded to Southeast. (Tr. 2986-87) However, on the eve of his hearing testimony he was told by Southeast's counsel that Butler, as General Partner, would appoint herself as the General Manager. (Tr. 2980-89, 3168) It should be noted that Davidoff emphasized that CMNY has "never done a deal without competent management" and that, before investing, CMNY "would have to be satisfied with the management and the involvement of the management and the role of the management." (Tr. 2887)

167. *Butler's Present Business Activities* - As set forth, *supra*, Butler and her husband jointly own and operate three McDonald's-franchised stores on a full-time basis in Pompano Beach and Ft. Lauderdale through two corporations, Cherikel, Inc., and Wilenca, Inc. These are the only businesses she has ever owned or operated. (Southeast Ex. 2, pp. 1-2; Tr. 1412-14) Butler holds 48% of the stock and is a Vice President, Treasurer, and director of each corporation. Her husband owned 52% of the stock and is President and a director of each company. There are no other officers or directors. (Southeast Ex. 2, pp. 1-2; Tr. 1399, 1409, 1413-14)

168. Butler is Office and Business Manager, with administrative responsibilities for all three restaurants. Her duties include formulating policy, supervising local marketing, preparing budgets, hiring and firing personnel, and supervising accounting procedures. She is responsible for cash flow management and related matters and is also involved in local marketing for the restaurants. The Butlers, functioning as a husband-wife management team, have frequent "informal" stockholder and Board meetings to formulate overall policy. Butler presently devotes a minimum of 40 hours a week to these duties. (Southeast Ex. 2, p. 2; Tr. 1440-46) Butler does most of her work at home in what she regards as the corporate business office. (Tr. 1446-48) Her husband, on the other hand, splits his time between the restaurants and their home, devoting as many as 50 or more hours a week (sometimes seven days a week) to his duties as the operational head of the companies' restaurants. He has been trained by McDonald's to be the licensed operator of the restaurants. (Tr. 1413, 1446-48, 1450, 1452-53, 1458)

169. Should Southeast be granted the authorization for its proposed station, Butler proposes to relinquish all of her "day-to-day" activities for Cherikel and Wilenca. She represents that she "will no longer be involved on a day-to-day basis in the management of either company." (Southeast Ex. 2, p. 4) Butler told Messrs. Perry and Davidoff that she would transfer her day-to-day responsibilities to her husband. (Tr. 3165-66) However, she does not intend to sell the McDonald's restaurants or her interests in Wilenca or Cherikel. Nor will she resign her

corporate offices. (Tr. 1437) She will continue to be involved in overall policy decisions such as pursuing financing. (Tr. 1443)

170. Butler and her husband did not inform McDonald's of her commitment to Southeast until three or four weeks before the hearings, after the question had been raised at her deposition. (Tr. 1437) She then suggested to her husband that he contact McDonald's officials about the matter. (Tr. 1437, 1451, 1818-19, 1838-39) She does not recall whether any corporate minutes memorialize her intent to stop working for Cherikel and Wilenca, because she does not know "if that's been a formal decision." (Tr. 1463-64)

171. No one person now employed by Cherikel or Wilenca is qualified to assume Butler's various day-to-day duties. (Tr. 1450) She expressed the view that store managers could be trained to perform certain of her husband's supervisory functions at the stores, which would free him to move more into office duties, should she relinquish her responsibilities. (Tr. 1447, 1450) However, she conceded, for example, that the monthly accounting reports, the preparation of which she supervises, require several days of her time. Such reports could not be entrusted to the restaurant managers. (Tr. 1461-62) Butler cannot say whether her husband would assume this task and the related task of working with their accountant, or whether they would hire someone else. (Tr. 1462) The Butlers' office assistant, hired in July 1987, is not even qualified to be an executive secretary, much less to assume Butler's responsibilities. (Tr. 1462-63) Similarly, while Butler testified that she will relinquish her duties supervising the company's local marketing efforts, she did not explain who will assume those duties in her stead. (Tr. 1444)

172. *Relationship of Limited Partners To Each Other and To Butler* - While none of the members of the Perry Group (Perry, Courtney, Davidoff, Levin, and the Baers) have ever met any of the Chicago Group (Katten, Holland, Grossman, and Gerald B. Cohen), Perry found the latter acceptable on Cohen's recommendation. (Tr. 2490, 2496)

173. The business and personal relationships of the Perry Group are detailed, *supra*, and will not be repeated. Baer initially assumed that Perry would be involved in managing the station "because we knew him as an operator of broadcast stations." (Tr. 2636, 2639) Baer had "gotten the impression" from Perry, because he was a broadcasting executive, that he would "play some kind of active role in the station." (Tr. 3323-24) Only later did Baer learn that Perry was not to be actively involved. (Tr. 2636, 2639, 3324-25) Nevertheless, Baer "was very much being guided in this investment" by Perry. It was Perry who told him about it and introduced him to the attorneys. It was Perry who investigated Butler. Baer related that it was Perry who "sort of structured the financial [sic] of the deal," and, as a result, he, Baer, listened to whatever he said. (Tr. 3368)

174. As noted, *supra*, Baer has never met Butler or spoken to her on the telephone. In placing his trust in Butler, as General Partner, Baer has relied on the judgment of Perry and Davidoff. It was up to them whether or not to pursue other candidates for General Partner. Baer had no idea how long Perry and Davidoff met with her in June 1986 or whether they asked for references. He never asked for any references or any evidence that the Butlers' businesses are successful. (Tr. 3328-29) Baer left up to Davidoff, whom he regards as a good negotiator, the

decision on what role Butler would play at the station. He did not discuss with Perry or Davidoff what managerial position would be offered. (Tr. 3331-33)

175. Davidoff explained that he is placing his reliance on the limited partners in the Perry Group, "people we've dealt with for a long time and we are not concerned about having problems with them." (Tr. 2898-99) He is reassured by his long-standing relationship with Perry and the fact that the Perry Group controls 72% of the limited partnership. Davidoff will look to Baer and Perry in the future with regard to the investment in the venture. Davidoff explained that he will look to the "large players" if "fresh money" is needed, if "experience" is needed, and if Southeast or CMNY "need[s] some input from the limited partners as to what we should [do] now." (Tr. 3192-93) Davidoff, who characterized the venture as "high-risk," explained that he listened to the proposition because it is from Perry, whom he regards as a "good businessman" who understands the broadcast industry. (Tr. 2885-87)

176. Courtney has never met Butler. (Tr. 4329-30) In deciding to invest he relied on Perry's "broadcast experience and judgment." (Tr. 4367-69) Courtney explained that he will want Perry's opinion about how things are going at the station, based on reports from Butler. (Tr. 4329-30)

177. Katten has never met or spoken to Butler, but believes her to be a strong managerial candidate because of Cohen's judgment and because Cohen told him that the "other significant limited partners in the venture," namely, the Perry Group, were of that belief. Cohen had interviewed Butler "at length," before agreeing to her selection as General Partner. (Tr. 4276)

178. Grossman likewise has never met or spoken to Butler. He understood that she was "selected" after an interview by several limited partners. He did not attend the interview because he believed that his interests were represented by the Perry Group. (Metroplex Ex. 85, pp. 15-18)

179. Gerald B. Cohen has never met Butler and knows nothing about her. He was not aware as to who will manage the proposed station. He is relying totally on Grossman, who is an investment counselor for pension funds. (Tr. 3408, 3421, 3424, 3427, 3429-31) "Whatever he said to do, I did." (Tr. 3437)

180. Levin has never met or talked to Butler. He first learned her identity when he received a letter requesting a capital contribution and sent her a check. (Metroplex Ex. 84, pp. 21-23) Since investing, Levin has spoken with Baer "from time to time" about the investment. He also received copies of documents in the WHYI litigation from Cohen, whom he calls to inquire about the progress of the case. (*Id.*, pp. 25-27) At one point he asked Cohen who, if anyone, at the station would have broadcast experience, and Cohen told him that "there would be experienced broadcast people coming on board." (*Id.*, pp. 44-47)

181. Holland has never met Butler. He did not attend her interview in June 1966 because he relied on the judgment of the Perry Group. (Tr. 3594-95, 3628) Holland explained that he "had a good relationship" with Cohen, and since there were people whom counsel "had dealt with in the past . . . his judgment obviously led to my being more comfortable with the relationship." (Tr. 3627-28)

182. *Limited Partners' Understanding re Terms of Partnership Agreement* - Paragraph 22(c) of the partnership agreement provides that a majority of the limited partners may, by vote, remove the General Partner "only for good cause," defined, in part, as an adjudication of incompetence by a court of competent jurisdiction. (Southeast Ex. 12, p. 16) Perry, at his September 1987 deposition, construed the term "incompetent" in paragraph 22 to mean that the limited partners could remove Butler if her performance at the station constituted incompetency. (Tr. 2531-32) However, at the hearing he acknowledged that he had erred and that the only basis for Butler's removal would be an adjudication that she was mentally and physically incompetent. (Tr. 2532-33) He admitted that counsel had told him that his former understanding was correct. (Tr. 2533-34)<sup>14</sup>

183. Katten, who is an attorney, also understood at the time of his September 1987 deposition that Butler could be removed as a manager by the limited partners "upon any good reason for doing so." However, like Perry, he was furnished a "correct" understanding by counsel after his deposition. (Tr. 4295-97)

184. Katten testified at the time of his September 1987 deposition that he understood that, like other partnerships with which he had been involved, Southeast would form an "audit" committee of limited partners to approve Butler's salary. This "incorrect" understanding was corrected by counsel after the deposition. (Tr. 4284-90) Grossman, whose deposition was received in evidence in lieu of his testifying at the hearing, presumed that the limited partners would determine Butler's salary. (Metroplex Ex. 85, pp. 39, 41) Courtney understood at the time of his September 1987 deposition that the limited partners would be consulted about Butler's salary and benefits. However, he now feels differently, based on a call from Cohen and a "more thorough" reading of the partnership agreement. Courtney explained that his deposition response reflected his past experience in other limited partnerships, wherein the limited partners were often consulted on "anything important," e.g., compensation of the General Partner. In September 1987, he felt that this was a procedure that would be followed in this case. (Tr. 4348-54) Perry, until corrected by counsel, likewise understood that Cohen & Berfield would make a recommendation to him concerning Butler's salary. Even after being corrected, he understood that he could retain Cohen & Berfield to investigate whether Butler's determination of her salary constituted "milking" the partnership. (Tr. 2498-99, 2582, 2599-2600)

185. Davidoff testified at his deposition that he and others had yet to make the decision whether to employ experienced management personnel at the station. He corrected this statement at the hearing to say that the General Partner will make this decision. (Tr. 2993-95)

### (3) Other Media Interests

186. Neither Southeast nor Butler has an ownership interest in any medium of mass communications. (Southeast Ex. 2, p. 1)

187. Perry is President, a director, and 30% voting stockholder of the licensee of WADK(AM), Newport, Rhode Island. His wife, Jane N. Perry, holds an additional 30% and is also an officer and director. Courtney is an officer, director, and 40% voting stockholder. Perry is also President, a director, and 80% voting stockholder of the licensee of WOTB(FM), Idletown, Rhode Island. His wife is an officer. Courtney is an officer, director, and

20% voting stockholder. (Metroplex Ex. 33; Tr. 2412, 2416-17) Perry also owns a 5% limited partnership interest in a cable television system with approximately 2,700 subscribers on Martha's Vineyard, Massachusetts. (Tr. 2409-11)

188. As of February 20, 1987, CMNY Capital, L.P. directly held a 7% voting interest in the licensee of WIVI(FM), St. Croix, Virgin Islands. Baer was a director of that licensee and its parent company. (Metroplex Ex. 33; Tr. 2834-38) CMNY also has an 8% interest in Founders Communications, which owns 16 newspapers in the Houston, Texas, area, including three daily newspapers, nine newspapers published weekly, semi-weekly or bi-weekly, and four "shopper" papers. (Tr. 2842-48) In addition, CMNY holds a 20% interest in Techcom, Inc., and a 30% interest in Intercontinental Publications, Inc., publishers of five controlled-circulation magazines. (Tr. 2851-54) As of February 1987, CMNY also held a 6.1% indirect interest in cable television systems in Ohio and West Virginia. (Tr. 2849-51)

#### (4) Auxiliary Power

189. Southeast proposes to utilize an auxiliary power generator in the event of a power failure. (Southeast Ex. 2, p. 4)

## II. THE SOUTHEAST FINANCIAL CERTIFICATION ISSUE

### A. Butler's Certification Re Southeast's Financial Qualifications - 9/3/86

190. When Butler, Southeast's General Partner, signed Southeast's application on September 30, 1986, and filed it with the Commission on October 30, 1986, she answered "Yes" to Question 1 of Section III of the application form, thereby certifying that "sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue." (Metroplex Ex. 76; Tr. 2164, 2176) She also answered "Yes" to Question 2 of Section III, thereby certifying that she had "reasonable assurance" that Southeast's limited partners had "sufficient net liquid assets" to meet their commitments and that CMNY had "a present firm intention" of lending \$600,000 to the partnership. (Metroplex Ex. 76)

191. When Butler certified that Southeast was financially qualified, she based this representation on the following documents: operating cost estimates prepared by Cohen, Southeast's counsel (Southeast Ex. 3, p. 1 and att. 1; Tr. 1500, 3652); a letter dated July 23, 1986, from Southeast's engineer, Dr. Robert L. Hoover (Hoover), concerning equipment and installation costs (Southeast Ex. 3, att. 2); and a loan commitment letter in the amount of \$600,000, dated July 28, 1986, from CMNY Capital Corp. (CMNY), a small business investment company. (Southeast Ex. 3, p. 1, att. 3)

192. According to Butler, at the time she signed Southeast's application, the \$600,000 loan commitment letter gave Southeast almost \$135,000 more than its estimated costs of \$465,709, which appeared to be ample to cover any costs that may have been overlooked or underestimated. (Southeast Ex. 3, p. 2)

### B. Estimated Cost of Construction and Operation as of 9/30/86

#### (1) Estimated Operating Costs

193. The budget prepared by Cohen estimated that operating costs for the first three months would be \$240,709. The budget was broken down into five principal categories, and these in turn contained more than 40 sub-categories. (Southeast Ex. 3, att. 1) The first category was "General and Administrative" at \$71,114, with 19 sub-categories, including general manager's salary (\$18,750). The second category in the operating budget was "Program, Advertising and Promotion Departments" at \$70,600. The third and fourth categories were, respectively, "News, Public Affairs and Sports Departments" at \$30,450 and the "Sales Department" at \$48,545. Lastly, the "Engineering Department" was estimated at \$20,000. (*Id.*)

194. Butler accepted these estimates as "[c]ost estimates [that] had been prepared by individuals I believed to be experienced in such matters." (Southeast Ex. 3, p. 2) She identified those individuals as Cohen and Hoover, an engineering consultant retained by Cohen. (*Id.*, p. 1; Tr. 1503) She knew, however, that Hoover's only contribution was, as discussed, *infra*, to estimate equipment costs. She was aware that he had no input into the cost estimates in the three-months' operating budget. (Southeast Ex. 3, p. 1; Tr. 1500, 3652) Butler placed "total reliance" on Cohen with respect to operating costs. (Tr. 2167)

195. The record is silent as to where or how Cohen obtained his figures. Butler acknowledged that she did not know how Cohen obtained his figures or what basis, if any, he had for them. (Tr. 1500)

196. Butler recalled two meetings with Cohen prior to the time she met with him to review the budget on July 30, 1986. (Tr. 1500-01) She believed Cohen to be experienced in the preparation of cost estimates. (Southeast Ex. 3, p. 2; Tr. 1503) However, she did not know if Cohen had made any investigation to determine whether the figures in his cost estimates were accurate. Nor did she know if Cohen contacted any Miami-Ft. Lauderdale radio stations concerning his cost estimates. (Tr. 1501-02) She knew that he did not contact the site owners of Southeast's proposed sites. (Tr. 1502) She did not know whether Cohen had station clients in the Miami-Ft. Lauderdale area and as far as she knew Cohen had never owned a radio station. Moreover, she did not know if he had ever worked at a radio station. (Tr. 1501-02)

197. At the July 30, 1986, meeting, Cohen had a preliminary draft of Southeast's proposed cost estimates, which included cost of construction and three months of operating costs. (Tr. 1862) The only document he had that supported his cost estimate figures was a letter from Hoover concerning the cost of construction; namely, equipment and installment costs. Butler saw no documents. (Tr. 2166-67) She had no documents. (Tr. 1506) They reviewed and discussed the estimates in the draft. (Southeast Ex. 3, p. 1; Tr. 1513) She did not ask to see additional documentation. She simply asked him about the numbers. She did not remember asking specific questions on the items. She might have asked how he arrived at the figures and what the dollar amounts represented. (Tr. 2167) She did not recall giving him specific figures or information in any category. (Tr. 1506)

198. The record does not disclose anything in Butler's background or experience that could have given her reasonable assurance as to the reliability of Cohen's operating cost figures. She explained that she reviewed the draft budget in light of her "general experience in business in the Miami area." (Southeast Ex. 3, p. 2) However, she admitted that her general business background did not include knowledge about such things as the amount a station with Southeast's proposed format would have to pay in salaries;<sup>15</sup> the price of records and tapes for a FM radio station; music license fees; the salary of a sales manager; or the cost of a wire or news service. (Tr. 1507-11, 1514-15, 2238) She recalled that Cohen made notes as they talked and that he took the draft document and notes back to his office for retyping. (Tr. 1862)

199. It is noted that estimated salaries accounted for 15 of the approximately 40 items in the budget, and those 15 items accounted for approximately 46% of the total budget.<sup>16</sup> As noted earlier, the record is silent as to the basis for those salary figures. It shows only that Butler accepted the figures that Cohen gave her without knowing what basis, if any, he had for them.

200. Butler conceded that her "general experience" gave her no basis for evaluating other items in the budget, including the figures for records and tapes (\$1,550), music license fees (\$4,440), wire service (\$3,000), news service (\$1,500), and antenna and transmitter site rental (\$12,500). (Southeast Ex. 3, att. 1, pp. 3-4; Tr. 1510-11, 1955-61, 2169-71, 3652) She also had no specific information to support the budget figures of \$5,000 for advertising and promotion, \$2,250 for business machine rental, or \$4,500 for medical insurance. (Tr. 1516, 1550-54, 1564) These eight items total \$31,850 and comprise an additional 13% of the budget on which she based her certification.

201. When Butler left the July 30, 1986, meeting with Cohen, she retained a copy of the draft budget. (Tr. 1514) She and Cohen discussed the budget during telephone conversations during the period July 30, 1986, and their meeting on September 30, 1986. However, she did not recall making any revisions. (Tr. 1515) Cohen brought a copy of Southeast's budget to the September 30, 1986, meeting at which Butler certified that Southeast was financially qualified. They made no changes in the budget at that meeting. (Southeast Ex. 3, p. 1; Metroplex Ex. 76; Tr. 1515) She believed the estimates reasonably reflected the cost of constructing the station and funding its operation for a three month start-up period. (Southeast Ex. 2, 2)

202. Butler did no research to prepare for her budget meetings with Cohen. (Tr. 1504) She did not visit a radio station and, in fact, has been in a station only once, when she went to a Ft. Lauderdale station for production of a commercial in 1983. (Tr. 1505)

203. Butler did not discuss with Cohen prior to the time she certified as to Southeast's financial qualifications what impact the proposed format of the station would have on the budget. (Tr. 1531) Although Southeast proposes to broadcast public affairs and news programming, she could not say how much public affairs programming would be presented, what form it would take, how many hours of news would be broadcast, how much of it would be local, why she had separate estimates for "Wire Service" and "News Service," or which services would be used at the station. (Tr. 1520-22, 1546-48) Although Southeast proposes to broadcast various kinds of informa-

tional programming, including programs in Patois (the Haitian dialect), programs on the needs of neglected and battered women and children, and "survival" programming for the poor, Butler did not know the amount or length of such programming or the cost of acquiring or producing it when she certified that Southeast was financially qualified. (Tr. 1523-26)

#### (2) Estimated Cost of Construction - Equipment Costs and Installation

204. The other category of costs considered by Butler when she certified that Southeast was financially qualified was the \$225,000 estimate for "Cost of Acquiring Equipment including Auxiliary Generator." That figure was based upon a letter of July 23, 1986, from Hoover to Cohen, attached to which was a page headed "Cost Estimates for WHYI-FM." (Southeast Ex. 3, att. 2)

205. Hoover, who was hired by Cohen, was the sole source for the \$225,000 figure. Butler, who relied on Cohen to hire a qualified person, never met or spoke to Hoover and knew nothing about his qualifications. (Tr. 1511-12) She did not know how he obtained his estimates or whether he had ever provided such estimates to other clients. (Tr. 1512) Hoover, for his part, did not learn for whom his services were provided until the day before his deposition in August 1987. Hoover's bill was paid by Cohen & Berfield, and he reported exclusively to Cohen and Roy Boyce (Boyce) of that firm. (Tr. 3642-49; Metroplex Ex. 86)

206. On July 8, 1986, Cohen asked Hoover to develop a cost analysis to duplicate the WHYI facilities. Cohen, by letter dated July 8, 1986, confirmed this fact, enclosing a copy of the license authorization for WHYI. (Metroplex Ex. 86; Tr. 3643-44) The license specified a transmitter site at Pembroke Park, which will be referred to as the "old" site or the "candelabra" site. (Tr. 3649) Hoover understood that he was not required to replicate the exact equipment on the WHYI license, but rather to achieve the operational capability of the instrument of Southeast's authorization. (Tr. 3649) Shortly after receiving the letter from Cohen, he learned from his data file and his research, using *Data World*, that WHYI also had a construction permit that authorized it to operate from a different site. (Tr. 3651, 3684-85) This second site will be referred to as the new site or the "Gannett" site. (Tr. 3681) Hoover understood that he was to replicate the facilities utilized by WHYI at both sites. (Tr. 3649-50) Hoover made no effort to determine from which site WHYI was then operating. (Tr. 3685) He did not visit either site. (Tr. 3680) Hoover was aware that the Gannett tower was a new design with many problems. (Tr. 3698) He understood that Gannett's master antenna had burned three or four times and he did not know if the problems had been resolved. (Tr. 3717)

207. It is appropriate to set forth a brief history as to Metroplex's use of the old and new antenna sites. Prior to March 1985, WHYI's antenna was located on a candelabra tower at Pembroke Park in Broward County. In early 1985, pursuant to a construction permit (BPH-840711AW) granted by the Commission in September 1984, the station relocated to a master antenna shared by eight other FM stations on the Guy Gannett tower in Dade County. The station's operation from the Gannett site has been pursuant to program test authority; its license application has remained pending from 1986 to the present. Because of ongoing technical difficulties with the

Gannett master antenna, WHYI has, from time to time, operated from the candelabra tower with Commission consent. (Southeast Ex. 3, att. 5; Tr. 1969-71, 1994-98) It is Metroplex's intention that the candelabra installation would eventually serve as an auxiliary site. (Southeast Ex. 3, att. 5) Hoover acknowledged that it was "common knowledge" in the broadcast engineering community for many years prior to 1986 that there were problems with the Gannett master antenna. (Tr. 3717-18, 3720)

208. Hoover, prior to July 23, 1986, contacted a number of vendors to obtain cost estimates for the equipment. (Tr. 3662-63) He did not contact the site owners or site representatives to determine the cost of locating on or the availability of slots on the towers at the old or new sites because he was not asked to do so and he did not want to get into anything that was not his business. (Tr. 3665, 3702-03) Hoover did not consider whether WHYI had incurred expenses getting on the Gannett master antenna. (Tr. 3694-95) He made no effort to speak to any representative of any of the stations located on the Gannett master antenna regarding costs and made no effort to ascertain the cost to a newcomer to replace WHYI on the Gannett master antenna. (Southeast Ex. 1, att. 2, p. 1; Tr. 3681, 3686, 3761)

209. Additionally, Hoover never made an effort to determine at which site WHYI was operating in July 1986, or what type of transmitter or related equipment it was using at either site. (Tr. 3685, 3708-11, 3720-21, 3728-29) Hoover, in his July 23, 1986, letter to Cohen, stated that the cost to duplicate the Gannett tower would be prohibitive,<sup>17</sup> but that "a newcomer could be accommodated where WHYI-FM was vacated." He recommended that "No new antenna should be considered for the 'Gannett' site, . . ." and suggested that the \$200,000 package would cover it. (Southeast Ex. 3, atts. 2 and 4) Hoover explained that he gave his client cost estimates for equipment for both the candelabra and Gannett sites in an effort to provide as much information as he could to let them make a decision. (Tr. 3716) Hoover further explained that it was the function of the cost table he provided to set out the costs to buy equipment for one site or the other. (Southeast Ex. 3, atts. 2 and 4; Tr. 3716) According to Hoover, using the existing antenna at the candelabra site Southeast could acquire the remaining equipment for that site for \$200,000. Similarly the cost of equipment to the Gannett site would be around \$200,000. (Southeast Ex. 1, att. 2, p. 2; Tr. 3762-63) Based on the Hoover letter and his cost estimates and her discussion with Cohen, Butler estimated the cost of acquiring equipment and installation to be \$225,000. (Southeast Ex. 3, p. 1; Tr. 1975)

210. The \$225,000 figure did not include the cost of acquiring or leasing a place on the Gannett master antenna (new site) or the candelabra tower (old site). It was solely for the cost of equipment and installation. (Tr. 1977) It was Butler's understanding that Hoover's equipment cost estimates included equipment costs operating from either site and she explained that she and counsel took a larger estimate and that this figure would cover the cost of equipment operating from either site, but not both. (Tr. 1991-92, 2210, 2213, 3692)

211. It appeared from Butler's testimony that at the time she certified as to Southeast's financial qualifications that she was confused as to whether Southeast proposed to operate from the candelabra tower (old site) or the Gannett master antenna (new site). However, one thing is clear, and that is that the \$225,000 estimated equipment

cost figure involved the equipment cost for operating from one, not two sites. (Tr. 1991-93, 2005-08, 2168, 2170-71, 2204-07) When Butler signed Southeast's permit application representing that Southeast "proposes to utilize the antenna now employed by FM Station WHYI . . ." it was her understanding that the site Southeast was referring to was "the site in use" and that there was a question as to "which of the two sites would end up being in use." (Tr. 2168, 2204-06, 2207, 2211) It should be noted that Southeast's Notice of Publication published in the daily Ft. Lauderdale paper on November 12, 13, 19 and 20, 1986, informed the public that Southeast's antenna site would be located either at WHYI's licensed or authorized site. (Southeast Ex. 13)

212. Included in the estimated \$240,709 operating costs was \$12,500 for cost for antenna and transmitter site rental. (Southeast Ex. 3, att. 1, p. 4) The record is silent as to the basis of this cost estimate. Butler, at the time she certified, did not know if there were any discussions between a representative of Southeast and the licensee for station WHYI as to the cost of acquiring its sites. (Tr. 2168) She did not know if there were conversations between a representative of Southeast and the owner of either of the sites which were utilized by station WHYI. (Tr. 2168-69) She had "assumed" that this had been done. (Tr. 1961) In fact, no one on behalf of Southeast contacted the owners of the sites or their representatives. (Tr. 3767)

213. Butler did not know where either site was or how much land was in use at either site. (Tr. 2012-13, 2169-71, 2205) She had never checked with either site owner herself, she had never been told by Cohen or Hoover that either of them had done so, and she did not think that any of the limited partners had done so. (Tr. 1961-62) In fact, no one had done so. (Tr. 3766-67, 3675, 3681, 3688) No effort was ever made to determine what it would cost for "a newcomer [to] be accommodated where WHYI-FM was vacated" on the Gannett tower. (Southeast Ex. 3, att. 2, p. 1; Tr. 1991)

214. Butler relied on Cohen for the figure of \$12,500 set aside for antenna and transmitter site rental in the Southeast budget. (Southeast Ex. 1, p. 3; Southeast Ex. 3, att. 1, p. 4; Tr. 1510-11) It was her understanding that the figure of \$12,500 was to cover the cost of rental of either one of the sites used by station WHYI, but not both. (Tr. 1958, 2169, 2171)

215. Hoover never contacted the owner of either the old site or the new site, and his letter of July 23, 1986, did not say that he had done so. (Southeast Ex. 3, att. 2; Tr. 1955-60, 1977, 3767) He had no input into the \$12,500 figure for "Antenna and Transmitter Site Rental" in the budget that Cohen prepared for Butler. (Tr. 3652; Southeast Ex. 3, att. 1, 4) Butler was unaware where the \$12,500 figure came from, and the record is silent as to its source.

### (3) *The \$500,000 Bonus To Counsel*

216. Paragraph 2 of page 2 of the retainer agreement between the law firm of Cohen & Berfield and the principals of Southeast provides (Metroplex Ex. 19, pp. 2, 3-11):

In the event the Limited Partnership is awarded the authorization to construct and operate the Fort Lauderdale FM station, at the time such grant be-

comes a final Order, Cohen & Berfield will receive Five Hundred Thousand (\$500,000) Dollars as a bonus.

217. Butler was familiar with the terms of the retainer agreement on September 30, 1986, when she certified that Southeast was financially qualified. She had been given a copy of the agreement when she met with Cohen, Perry, and Davidoff in New York on June 13, 1986. She took it back to Florida with her, and at some point during the next two weeks she signed it and returned it to Cohen. (Tr. 2136-37, 2153-54; Metroplex Ex. 19, p. 3) As noted, *supra*, a month later, on July 30, 1986, she met with Cohen to discuss Southeast's financial obligations and how it would meet them.

218. Butler explained that she had not included the \$500,000 obligation in estimating the total expenses that Southeast would incur during the first three months of operation because the Commission's grant would not become a "final order" until three months after the station commenced operating. (Tr. 2132-33) She further explained that she learned from Cohen that the \$500,000 would not be due until "after this was in [sic] final order and that would not be the case until . . . sometime after the three month period." (Tr. 2132-36, 2173) This understanding with Cohen was never reduced to writing. (Tr. 2133) Butler never asked Cohen why the retainer agreement did not specifically set forth that understanding. (Tr. 2134) In September 1986, when Butler certified that Southeast was financially qualified, she had no document of any kind that amended the express terms of the retainer agreement and no such document exists today. (Tr. 2133)

219. When questioned as to when Cohen told her about the three-months' deferral of the \$500,000 bonus, Butler did not remember exactly when it was but believed that it was before she returned the retainer agreement to Cohen and "I think it must have been" before she signed the partnership agreement. (Tr. 2133)

220. Butler also explained that it was her understanding that if Southeast received the grant the facility would be of such value that Southeast would be able to raise the money. (Tr. 2130) She felt it would not be difficult to get financing for a radio station. (Tr. 2131) However, she admitted that she has never made any arrangements to obtain financing for the \$500,000. (Tr. 2131)

### C. Funds Available As Of 9/30/86

#### (1) Capital Contributions of Southeast's Limited Partners as of 9/30/86

221. As detailed, *supra*, the retainer agreement with Cohen & Berfield provided that \$200,000 would be charged by the firm for legal fees and out-of-pocket expenses "through an absolutely final decision in court." (Metroplex Ex. 19, p. 1) That amount was not included in the budget that Butler had before her when she certified that Southeast was financially qualified. However, this amount constituted prosecution costs and, when the \$200,000 is added to the \$225,000 in equipment costs and the \$240,709 in operating costs, the total costs exceeded the \$600,000 specified in the CMNY loan letter. (Southeast Ex. 3, att. 1, p. 1) Butler explained that the reason that the \$200,000 in legal fees was excluded from the budget was the expectation that the limited partners

would make the \$200,000 in capital contributions, as required by the partnership agreement. (Tr. 2174, 2552-54; Southeast Ex. 3, p. 2 and att. 1)

222. According to the capital contribution schedule set forth in the retainer agreement, each limited partner was required to pay 12.5 percent upon signing the agreement, 12.5 percent 30 days after the limited partnership agreement was filed, 25 percent due 15 days after designation, and the remainder was to be paid throughout the hearing process. (Metroplex Ex. 19, pp. 1-2) The provisions governing capital contributions and setting forth the ownership interests of each partner, including the general partner, were also incorporated in the certificate and limited partnership agreement of Southeast which was signed by all of the principals of Southeast and filed with the Florida Secretary of State on July 22, 1986. (Southeast Ex. 12) As of September 30, 1986, the date Butler certified to Southeast's financial qualifications, only \$50,000 of the \$200,000 had been paid. (Tr. 2151; Metroplex Ex. 75)

223. Although Butler had met some of the limited partners and had seen the signatures on the partnership agreement, she had not seen a balance sheet or financial statement for any of them, and had no personal knowledge of their financial resources. She explained that she "relied on Mr. Cohen that he had that information." (Tr. 2177) In fact, Cohen had not obtained that information from the limited partners. (Tr. 2227, 2901-02, 3012-17, 3364-65, 4305-06, 4355, 4367; Metroplex Ex. 84, pp. 33-34)

#### (2) The 1986 CMNY Loan Letter

224. At the time Butler certified as to Southeast's financial qualifications she had on hand a loan commitment letter dated July 28, 1986, in the amount of \$600,000 from CMNY Capital Company, Inc. (CMNY), signed by Davidoff as the President. After stating his awareness of Southeast's application, Davidoff's letter stated that CMNY proposed to loan Southeast up to \$600,000 for the purposes of constructing and operating the proposed station. The letter continued (Southeast Ex. 3, att. 3):

The loan will be for a period of five (5) years with interest payments calculated at a rate not in excess of two percent (2%) over the prime rate of Chase Manhattan Bank. No principal or interest payments will be required for the first three (3) months of the loan period with equal quarterly payments thereafter. The collateral for the loan will be all the tangible assets of the partnership and personal guarantee and pledge of assets of each of the principals as deemed necessary by CMNY.

We understand that the FCC does not require a contractually binding commitment from us at this time, and this letter is not such a commitment. We do intend by this letter to assure you and the FCC of our desire and intention to make the loan available on the terms and conditions indicated. Funding of the amount indicated, or any part thereof, will be subject to formal approval by CMNY after its review of Southeast Florida's financial condition and each of its partner's financial condition and repayment ability, and the execution of a loan agreement incor-

porating those terms and conditions that we may deem appropriate, as well as the availability of funds at the time the loan agreement is executed.

225. Butler played no role in the decision to have CMNY provide a loan letter to the applicant. As noted, *supra*, this commitment was made by Davidoff, a limited partner in Southeast, at the May 16, 1986, meeting. In response to a question by Perry at that meeting, Cohen proposed that the letter be in the amount of \$600,000, and that was accepted in reliance on counsel's judgment. Details as to the interest to be charged or repayment were not discussed, and nothing was committed to writing at that time. It was understood, at that time, that Cohen & Berfield would draft a letter "suitable for FCC purposes."

226. Butler first became aware of the possibility that CMNY would provide financing at her June 13, 1986, interview. Davidoff told her then that CMNY was prepared to provide financing. He did not specify an amount. He noted that "he would reserve the right to ask for certain liability on the part of the limited partners." (Tr. 2118-24) Butler was told that CMNY was a small business investment company. There was no discussion of whether CMNY had ever invested in a broadcast enterprise before. Davidoff did not, at this meeting, ask Butler what her net worth or income was. Nor did he ask whether she was financially able to guarantee the loan or to sustain a general partner's liability for partnership obligations. (Tr. 2125-26)

227. Based upon her review with Cohen of various financial information about CMNY, Butler felt confident that CMNY was capable of providing the \$600,000 funding as provided in the July 28, 1986, CMNY loan letter. (Tr. 2179-80) At the time Butler certified as to Southeast's financial qualifications, she had no assurances that the principals of Southeast would be willing to meet the contingent collateral requirements of making personal guarantees and pledges of assets to CMNY. (Tr. 2160-62, 2183, 2522-23, 3017-20) Butler explained that, based on her discussions with Cohen, she did not think it necessary to obtain indications in writing that the limited partners would be willing to meet the contingent collateral requirements. In her view, it was something that the lending institution could request if it deemed it necessary. (Tr. 2160, 2183)

### III. SOUTHEAST'S FINANCIAL QUALIFICATIONS ISSUE

#### A. Increase in Total Cost of Construction and Operation and in Funds Available

228. In a petition to enlarge issues filed by Metroplex on April 20, 1987, Ross, WHYI's General Manager averred that at the very least the new licensee would be required to reimburse Metroplex for its share of the capital costs relating to the Gannett master antenna. Ross represented that this amounted to a sum in excess of \$166,000. Ross also stated that monthly rental for the Gannett tower was \$5,000, and that monthly rental payments on the separate leases for the candelabra tower were \$3,058. (Southeast Ex. 3, p. 3, att. 5, p. 2) No provision had been made in the Southeast budget for capital costs for the Gannett site. (Southeast Ex. 3, 3, att. 1, att. 5)

229. As noted in paragraph 4., *supra*, the Presiding Judge, by *Memorandum Opinion and Order* (FCC 87M-1287), released June 4, 1987, enlarged the issues to determine whether Southeast's financial certification was false and to determine whether Southeast is financially qualified to construct and operate the proposed station. As detailed in paragraphs 192., 193. and 204., *supra*, Southeast had originally estimated its operating and construction costs as \$240,709 and \$225,000, respectively, for a total cost of \$465,709. Subsequent to the specification of a financial issue, Southeast increased its operating costs by \$162,341, to \$403,050 and increased its construction costs by \$200,000, to \$425,000. As a result, its total estimated cost to construct and operate the proposed facility now totals \$828,050. In order to meet these increased costs, Southeast obtained a new loan letter from CMNY for \$900,000. (Southeast Ex. 3, pp. 2-4)

#### B. Revised Estimated Cost of Construction and Operation

##### (1) Retention of Diaz as Consultant re Operating Expenses

230. Before her August 1987 deposition, Butler and counsel were aware that they might have had "inadequate information" on other cost items. They recognized that they needed to review the entire 1986 budget to "make adjustments" and to address "possible weaknesses or areas that needed to be fortified." During her deposition, Butler's concerns about these matters increased because "[t]here were questions about the budget that I had doubts about." It became apparent to Butler "that our estimates on equipment were way off" and that "there were obviously items that we had not included in the budget that needed to be included." (Tr. 1869-74, 1897, 1916-21, 1931, 1935, 2214-16) These concerns led Butler to conclude that she and Cohen needed "additional expertise." She suggested to Cohen that an experienced broadcaster be retained to study Southeast's budget projections. It was decided that Cohen would locate such a person, since she did not know any experienced broadcasters. (Tr. 1554, 1874-76; 1905; Southeast Ex. 3, p. 3)

231. Subsequently, Cohen notified Butler that he had retained Rafael Diaz Gutierrez (Diaz) on Southeast's behalf. He described Diaz's qualifications to her during a telephone conversation. She understood that Diaz had previous broadcast experience, and that he was to review the estimated operating costs and make adjustments where he thought it was appropriate. (Tr. 1876, 1894-97, 1905) Butler acknowledged that she did not know what materials Diaz was shown, that she had no discussions with Diaz and never met him, and that she made no personal investigation or inquiry to confirm or corroborate any of Diaz's estimates. (Tr. 1530, 1554-55, 1866, 1913, 1922)

232. Diaz was contacted by Cohen on behalf of Southeast on September 21, 1987. (Metroplex Ex. 77; Tr. 2648) Diaz knew Cohen because he was a client of Cohen's for about six months beginning in February or March 1987. (Tr. 2695) Cohen told Diaz that, based on Diaz's experience as general manager of a radio station in New York City, and as a vice-president of a station in Los Angeles, he needed Diaz's services to prepare a budget for 90 days for a Class C, 100,000 watt station operating 24 hours. (Tr. 2651, 2716, 2775) Diaz had been the General Manager of WSKQ-AM, a 24-hour 5,000 watt station in New York City from October 1, 1983, to October 28, 1985. He also helped supervise KSQW in Los Angeles, although he did not serve there as General Manager. Neither station

was a new facility when acquired in 1983, and changed to Spanish-language operations. (Tr. 2661-65, 2692-93; Southeast Ex. 4, p. 41; Metroplex Ex. 80) Diaz never owned, operated, or worked at a station in the Miami-Ft. Lauderdale market. (Tr. 2665)

233. Diaz also worked as an announcer at Cuban and American stations from 1944 through 1957. From 1958 to 1972, he was employed as an Assistant Director at WHOM-AM-FM in New York, where his duties involved programming strategy and management of the radio announcer and marketing staff. (Southeast Ex. 4, p. 3; Tr. 2700-02) Each of the radio stations at which Diaz has worked was Spanish-language. (Tr. 2667-68, 2813) Diaz never prepared a budget for a Class C station. (Tr. 2784) Diaz had never taken on a similar assignment, never testified as an expert in FCC proceedings, and had never been qualified anywhere as an expert regarding the budget of a radio station. (Tr. 2653) He had not been asked by Cohen if he had any experience in an English language market. (Tr. 2815) Diaz assumed Cohen knew his familiarity was limited to the Spanish language market. (Tr. 2814) Diaz acknowledged that his budget experience was limited to Spanish language format stations and that he based his estimates on his experience with the Spanish market. (Tr. 2670-71, 2813)

234. Diaz has never owned, operated, or been employed at a contemporary hit radio (CHR) station. He has never visited WHYI. (Tr. 2665-67) While he was of the view that there is not much difference between the budgets of CHR and Spanish-language stations, he admitted that he has no experience with or knowledge of the operating budget of a broadcast facility other than a Spanish-language station. (Tr. 2668-71)

235. On September 21, 1987, counsel Boyce sent Diaz copies of Southeast's 1986 budget, Hoover's July 23, 1986, letter, and Hoover's amended cost estimates. Boyce's letter instructed Diaz that Southeast had to allow \$225,000 for equipment and \$225,000 for site acquisition costs, leaving \$450,000 to work with in terms of the cost of operation up through the first three months. The letter added that Southeast had a \$900,000 loan commitment, but might need to "leave a cushion for payments that might come due if the loan is taken down prior to the beginning of operation." Boyce's letter indicated a carbon copy to Butler. (Metroplex Ex. 77)<sup>18</sup>

236. Diaz acknowledged that he was told by Cohen during a September 1987 telephone conversation, and again in Boyce's letter, that Southeast had to allow \$225,000 for equipment and \$225,000 for site acquisition costs. However, he insisted that he ignored these guidelines and that his budget of \$403,050 does not reflect in any way a mandate to keep his estimates below \$450,000. According to Diaz, he told Cohen that he would not take these guidelines into consideration and that his budget had no "cap" or ceiling on it, to which Cohen made no response. (Tr. 2654-59, 2697-98)

237. Cohen instructed Diaz to base his budgetary projections on a hypothetical "start-up" or new station, but one with its antenna, tower, transmitter, and studio facilities in place. Had Diaz been told that studio acquisition or renovation costs were necessary or that technical facilities had to be acquired and/or constructed, his cost estimates would have been increased by an undetermined amount. (Tr. 2801-05)

238. Cohen and Diaz met on October 23, 1987, at the latter's New York office, to review Southeast's 1986 budget. Diaz "started criticizing" the budget based on his experience in New York and Los Angeles. They reviewed the old budget and where Diaz agreed with it they left it alone; if he disagreed they changed it. The meeting took an hour to an hour and a half. Cohen took notes to reflect the proposed changes in the old budget. When they were finished, Cohen took the notes back to Washington and prepared a revised operating cost budget and a declaration, which he transmitted to Diaz for his approval. Diaz reviewed the material sent by Cohen and made no changes in the revised operating cost budget before executing the declaration. (Tr. 2660-61, 2674-75, 2681-84, 2697-98, 2718-20, 2729-31, 2733, 2787; Southeast Ex. 4)

**(2) Revised Estimated Operating Costs**

239. The revised operating cost budget is set forth, *infra*, detailing the increases from Southeast's 1986 budget both in dollars and percentages (Southeast Ex. 4, pp. 2, 5-7):

**Summary of Cost of Operation for Three Months\***

Category	Total	Vs. 1986 Budget
General and Administrative	\$84,300	M(+ \$ 13,186) (18.5%)
Program, Advertising and Promotion Department	112,050	(+ 41,450) (58.7%)
News, Public Affairs and Sports Department	35,350	(+ 4,900) (16.1%)
Sales Department	118,100	M(+69,555) (143.0%)
Engineering Department	23,250	M(+3,250) (16.3%)
Post Grant Expenses	30,000	M(+ 30,000) (100.0%)
NEW		
<b>TOTAL</b>	<b>\$403,050</b>	<b>M(+ \$162,341) (67.4%)</b>

\* A plus sign (+) indicates an increase from the 1986 budget, and a minus sign (-) indicates a decrease. New line items are designated "NEW."

General and Administrative	Quarterly
1 - General Manager	\$18,750
1 - Executive Secretary	4,000
1 - Sec'y/Recept.	3,500 NEW
1 - Bookkeeper	7,500 NEW
Accounting Services	5,500 +
Rental -studio and office (including utilities)	7,000 +
Office Furniture Lease	3,000
Business Machine Rental	4,000 +
Insurance (fire and liability)	4,000 +
Insurance (medical)	4,500
Legal - Corporate	900
Legal - F.C.C.	900
Membership Dues	750
Subscriptions	750
Telephone	5,000 -
Postage	750 -
Printing and Supplies	2,500 +
Initial Supplies (stationery, etc.)	3,000
Payroll Taxes	8,000 +
<b>TOTAL</b>	<b>\$84,300 +</b>

<b>Program, Advertising and Promotion Departments</b>	<b>Quarterly</b>
1 - Program Director	\$ 12,500
1 - Music Director	10,000
4 - Announcers (full-time)	25,000
4 - Announcers (part-time)	12,000
1 - Promotion Director	10,000 NEW
Records and Tapes	1,550
Music License Fees	10,000 +
Advertising and Promotion	26,000 +
Librarian	5,000 NEW
<b>TOTAL</b>	<b>\$112,050 +</b>
<b>News, Public Affairs and Sports Departments</b>	<b>Quarterly</b>
News Director	\$ 6,250
Public Affairs Director	6,000
2 - News Announcers	8,600 -
Wire Service	4,000 +
News Service	5,500 +
Expenses - Miscellaneous	5,000 +
<b>TOTAL</b>	<b>\$35,350 +</b>
<b>Sales Department</b>	<b>Quarterly</b>
General Sales Manager - Salary	\$ 15,000 plus incentives +
Auto	600
Expenses	2,000 +
Secretary	8,500 NEW
Traffic Manager	7,500 +
Assistant Traffic Manager	7,000 +
5 - Account Executives - Salary	50,000 plus incentives +
Auto	3,000
Expenses	10,000 +
Secretary	7,500 NEW
Gopher	7,000 NEW
<b>TOTAL</b>	<b>\$118,100 plus incentives +</b>
<b>Engineering Department</b>	<b>Quarterly</b>
1 - Contract Engineer	\$ 6,000 +
1 - Production Engineer	7,000 NEW
Telephone Transmission Lines	2,000 NEW
Light and Power	4,500 +
Maintenance and Repairs	2,250
Antenna and Transmitter Site Rental	(Not Considered)
Broadcast Line	1,500 +
<b>TOTAL</b>	<b>\$23,250</b>

240. Butler reviewed the Diaz "recommendations" and determined to accept them. Although the new operating budget was 67% higher than the budget she had previously accepted, she made no personal inquiry to corroborate the estimates and made no suggestions for changes. She accepted Diaz's figures because she was satisfied that she now had "the recommendations of a person experienced in broadcasting," who she was satisfied "did have knowledge of the Florida market." (Southeast Ex. 3, p. 3; Tr. 1912-13)

241. Diaz undertook no research of any kind before he met with counsel to review Southeast's budget. Nor did he make any inquiries of Miami-Ft. Lauderdale broadcasters. (Tr. 2698-99) He was unaware of the circumstances surrounding WHYI's transmitter sites and the fact that Southeast proposed operation from a master antenna. When he estimated the costs for light and power, he relied solely on his experience in New York and Los

Angeles. He was not familiar with the power requirements of a station operating from a master antenna. (Tr. 2705-0; Southeast Ex. 4, p. 7)

242. Diaz had no idea where Southeast's studio will be located. He conceded that the cost of telephone transmission lines between a studio and transmitter depends on the distance involved; nevertheless, he made no assumption as to the distance when estimating the cost of such lines for Southeast. Nor did he price the cost of transmission lines in Miami-Ft. Lauderdale. (Tr. 2705-09, 2745-47; Southeast Ex. 4, p. 7)<sup>1</sup>

243. Diaz did not have a copy of the programming statement in Southeast's application when he and Cohen met to review the 1986 budget. Although he was later provided a copy, he did not revise his budget figures for programming costs. The budget figures reflected Diaz's experience in New York and Los Angeles; they did not reflect what the cost of informational programming would be for Southeast's station specifically, or for Miami-Ft. Lauderdale stations generally. (Tr. 2709-15; Metroplex Ex. 68)

244. Diaz was told by Cohen that the \$18,750 salary for General Manager in Southeast's 1986 budget was "fixed" and could not be adjusted. Diaz did not ask counsel why this was so, and he was not told that a Southeast principal would be the General Manager. Diaz did not know whether General Managers of English language stations make \$18,750. (Tr. 2716-23, 2805-06; Southeast Ex. 4, p. 5)

245. Diaz did not know how many commercials or PSAs, or how much public affairs programming Southeast's station would carry. Although he doubled the 1986 estimated cost for studio and office space, from \$3,300 to \$7,000, he acknowledged that he was unaware of the cost of office space in Miami-Ft. Lauderdale, how much space Southeast will require, or whether Southeast proposes to consolidate its studio and offices. He likewise was unaware how many employees WHYI or any other Miami-Ft. Lauderdale CHR station employs. His estimates reflect only the experience of his stations in New York and Los Angeles. (Tr. 2724-27, 2775, 2788-89, 2797; Southeast Ex. 4, p. 5; Metroplex Ex. 81)

246. While Diaz more than doubled the 1986 budget figure for studio and office space due to what he viewed as a much greater need for production and related facilities, he did not increase the 1986 budget allocation for office furniture. This was in error, and Diaz now would increase his estimate for furniture by an undetermined amount. (Tr. 2788-93; Southeast Ex. 4, p. 5) He made a similar error with respect to medical insurance costs, which should have been doubled in view of his expanded number of estimated employees. (Tr. 2794) Diaz conceded that his small increase over the 1986 budget for payroll taxes had no specific basis. It is possible that it should be much larger, but Diaz did not "know exactly the bracket of the taxes in . . . Florida." (Tr. 2794-95)

247. Diaz believes that Southeast will have to conduct a "heavy" advertising campaign to launch its new station -- including billboards, television and radio spots, and bus signs. However, he had no knowledge as to the cost of billboards in Miami-Ft. Lauderdale or the cost of advertising on Miami-Ft. Lauderdale English-language television stations. He made no specific inquiry to determine whether his estimate for advertising expenses was adequate. His only familiarity with the cost of TV advertising in the area was based on rates for a local Spanish language station

which a friend had given to him. Diaz did not know if Southeast proposed to advertise on local Spanish language television stations. Nor did he know whether Spanish language station rates differed from rates of English language television in Miami-Ft. Lauderdale. (Tr. 2732-38; Southeast Ex. 4, p. 6)

248. Diaz stated that his stations spent \$300,000 a year in prizes for contests because "all . . . stations need contests to compete for audience these days." Although he did not ask Cohen if Southeast would run contests, he earmarked \$26,0900 per quarter for them, under the "advertising and promotion" category. However, he did not explain how this \$26,000 allocation could include both contest prizes and advertising. (Tr. 2818-20)

249. Diaz had not seen Southeast's proposed public affairs programming before preparing his operating budget, and he was not told whether Southeast's station would broadcast local news or live sports programming. He was told that the station would be music, news, public affairs, and sports. (Tr. 2735) He was not informed as to the type of format of the music and he was not told how much or what kind of news, sports or public affairs would be broadcast. He concedes that this would cost money and that there is no budget item for live sports. He agreed that certain program formats entail the broadcast of more news than other formats, but he did not know what music format Southeast would use. Also, he did not know whether a network radio affiliation would affect the cost of programming, because his New York and Los Angeles stations were not affiliates. Nor did he know whether Southeast would affiliate. Diaz had no understanding as to how many commercials would be broadcast on the station, nor of how many PSAs would be broadcast. (Tr. 2725, 2734-40, 2797, 2812)

250. Diaz allocated \$1,500 for a broadcast line on the assumption that the station would have a mobile unit with small transmitter to cover events. However, he admitted that he did not know whether the station was going to do this sort of programming. (Tr. 2709) However, Diaz's budget omitted the cost of a mobile vehicle for the station's engineering department. The cost would be about \$3,000. (Tr. 2759-61) Also, his budget omitted a driver for the station, whose quarterly salary would be \$2,700 to \$3,000. (Tr. 2782)

251. The \$4,000 estimated quarterly cost for business machine rental in Diaz's budget includes a computerized traffic system and reflect's Diaz's experience in New York, where he paid \$16,000 per year to rent such a system. Diaz did not explain how his \$4,000 total could accommodate both the computerized traffic system and the cost of other business machines which he conceded are also included in his estimate; such as typewriters and copy machines. Recognizing this, Diaz estimated the other business machines could be bought or leased at a cost of approximately \$1,000 a month. (Tr. 2754-57, 2808-11; Southeast Ex. 4, p. 5)

252. Diaz specified positions for both a contract engineer and a production engineer. (Southeast Ex. 4, p. 7) He explained that, based upon his experience with a proposed music, news and sports format, there would be plenty of work for one production engineer to be busy every day from Monday through Friday. However, he admitted that he had no idea as to how much programming the proposed station would produce nor whether English language stations produce the same amount of programming as Spanish language stations. (Tr. 2757-59)

253. Diaz increased the amount originally proposed for news service from \$1,500 to \$5,000. He increased the amount in the event that the station decided to have correspondents in other countries, as he did at his station. (Tr. 2761-62) He did not know if Southeast understood news service to include correspondents in other countries. (Tr. 2798-99) He did not know the basis for the original \$1,500 estimate for news service in the old budget and did not ask. (Tr. 2763)

254. Diaz created the position of bookkeeper in the general and administrative department. (Southeast Ex. 4, p. 5; Tr. 2765) In his view, a bookkeeper was needed to prepare invoices and help the traffic staff bill clients. The old budget specified one person as secretary, receptionist and bookkeeper. (Tr. 2766) He also added a number of positions in the sales department, including a secretary and "gopher." (Southeast Ex. 4, p. 7) Diaz opined that at least one secretary was needed to serve the local and national account representatives of the station sales department. He had no understanding why the old budget did not provide for such positions. (Tr. 2767) Diaz also added the position of librarian to the advertising and promotion department. The function of the librarian was to keep the LP's in alphabetical order, to make certain that bad cassettes were replaced, and to pull LP's to meet listener requests. He was not aware of any major market station that did not have someone performing those functions. (Tr. 2769)

255. With respect to the \$25,000 for four full-time announcers, listed under the program, Advertising and Promotion Departments, a figure which he left unchanged, Diaz did nothing to verify the availability of persons for that amount because he was never told the station's format. (Southeast Ex. 3, att. 1, p. 3; Southeast Ex. 4, p. 7; Tr. 2811-13) He made no effort to check the salaries for positions in the Miami-Ft. Lauderdale markets. He did not know what a CHR disc jockey makes in Miami-Ft. Lauderdale. (Southeast Ex. 4, p. 6; Tr. 2811-14) All of his figures for personnel were predicated on his familiarity with the Spanish language market. (Tr. 2814)

256. Diaz acknowledged that he overlooked or underestimated a number of items in his budget. As noted, *supra*, he forgot to include a mobile van for the engineering unit at \$3,000 (Tr. 2759-61); an amount for additional furniture for the increased office space (Tr. 2789-91); the cost of a driver at about \$2,700-\$3,000 (Tr. 2782); medical insurance for the increased number of employees (Tr. 2794); and office equipment rental at about \$2,700-\$3,000. (Tr. 2809-10)

257. Diaz, in his written testimony relative to the estimated operating expenses, averred: "In addition to the operating expenses attached hereto, I estimate construction of the station will take approximately sixty days and about \$30,000 will be necessary as costs that may be incurred for post-grant expenses prior to the start of operation." He explained at the hearing that included among those pre-operational expenses would be \$4,166 for a person to prepare promotion during the pre-operating period; chief engineer at \$4,666; \$4,166 each for two disc jockeys; \$2,666 for a helper for the chief engineer; \$3,300 for an independent contractor to do public relations work; \$2,666 for a secretary; \$2,766 for a driver, and an additional \$1,570 for an expense which he could not recall. (Tr. 2775-85; Metroplex Ex. 81)

**(3) The \$200,000 Legal Fee**

258. The legal retainer agreement with Cohen & Berfield provided that the fee would not exceed \$200,000. At the time Southeast exchanged its revised financial proposal as part of its direct written case, all its limited partners had paid in their capital contributions for a total of \$200,000. Since that money had been paid to counsel, Southeast appropriately did not earmark any expense for legal costs. (Southeast Ex. 3, p. 2)

**(4) The \$500,000 Bonus to Counsel**

259. The retainer agreement between Cohen & Berfield and the Southeast principals provided (Metroplex Ex. 14, p. 2):

In the event the Limited Partnership is awarded the authorization to construct and operate the Fort Lauderdale FM station, at the time such grant becomes a final Order, Cohen & Berfield will receive Five Hundred Thousand (\$500,000) Dollars as a bonus.

There is no provision to cover this sum in Southeast's revised budget. As fully discussed in paragraphs 216.-220., *supra*, Butler, Southeast's General Partner, did not include the \$500,000 obligation in estimating the total expenses to be incurred by Southeast in constructing and initially operating its proposed station, because Cohen had told her that the \$500,000 would not be due until three months after the station commenced operations. She also understood that if Southeast was granted a construction permit that the facility would be of such value that it would be able to raise the \$500,000.

260. Perry also recalled discussions relative to the \$500,000 obligation and his understanding, based on Cohen's assurance, was that the \$500,000 would not be due until three months after operations commenced. (Tr. 2554-55) Perry recalled that Cohen told him in 1987, when he was preparing for his deposition, that "subsequent to the station going on the air, we had three months in which to raise the necessary \$500,000." (Tr. 2558) Perry had a similar conversation with Cohen in May-June 1986, when the retainer agreement was signed, in which he asked for a definition of the words "at the time such grant becomes a final order" and was told then that "it becomes a final order three months following the . . . commencement of operation of the station." (Tr. 2556-57) In Perry's mind, this means that the station will operate for three months before the grant becomes final. (Tr. 2557)

261. Perry also recalled discussing the \$500,000 obligation with Baer and Davidoff in May-June 1986. (Tr. 2555-56) Davidoff, at the hearing, explained that he understood, in May 1986, that it took 90 days for the grant to become a final order. (Tr. 3102) That was not Baer's recollection. When Baer was asked about discussion of the \$500,000 obligation, he conceded that in May-June 1986 "[w]e didn't focus on the exact timing . . ." His understanding, in May-June 1986, as to when the \$500,000 would be due was "[o]nly what's in this [retainer] letter." (Tr. 3392) In fact, Baer's memorandum summarizing the May 16, 1986, meeting which is set forth in full in paragraph 144., *supra*, made no mention of the \$500,000 bonus being deferred for 90 days. (Metroplex Ex. 25)

Baer, however, now understands that a "final order" is "granted after the station's in operation." The basis for that understanding is that Cohen told him within the last six months of 1987 that "the final order was issued after the station was in operation." (Tr. 3392)

262. Katten was also told, but only in late 1987, that three months would elapse before the grant became a "final order." (Tr. 4282-83) Levin was told the same thing in September 1987 (Metroplex Ex. 84, p. 33), and Gerald Cohen was told it in December 1987. (Tr. 3423) In September 1987, when Grossman was deposed, he had no idea when the \$500,000 would be due. (Metroplex Ex. 85, p. 31)

263. One fact is clear, and that is both when Butler certified in September 1986 that Southeast was financially qualified and, at the present time, neither Butler or any other Southeast principal has any commitment from any source to provide the funds to meet the \$500,000 obligation. (Tr. 2131, 2507-08, 2560, 3369, 3391, 4281, 4334, 4340)

264. Courtney expressed the view that the limited partners are not committed to advance the \$500,000. (Tr. 4339-40) Nor is CMNY. (Tr. 2969) When Baer was asked if the limited partners had discussed where the money would come from to make the \$500,000 payment, he replied that "somebody said -- it may even have been me -- that it would be easy to get a bank loan for at least part of the financing needs if we had an attractive license in the Ft. Lauderdale market." (Tr. 3344-45) According to him, he and his associates "sort of agreed that we'd take care of all that when the time came." (Tr. 3391) Katten's understanding is that the \$500,000 will be part of the budget and Southeast will fund with whatever financing package it ultimately obtains to construct and operate the station. (Tr. 4281)

265. Perry recalled that he, Baer, and Davidoff agreed in May-June 1986 that it would be the general partner's responsibility to raise the \$500,000, but Perry does not know if that was ever communicated to Butler. (Tr. 2559-61) When asked what Butler was told about her financial obligations, Perry replied that, "We very, very closely and carefully spelled out the fact that she would be responsible for all obligations, all debts of the partnership; and, of course, implicit in that is that she would be responsible for the financing that we did and, of course, this \$500,000, although we didn't specifically say that to my recollection." (Tr. 2562)

**(5) Revised Estimated Cost of Construction - Equipment Costs and Installation**

266. As noted, *supra*, based upon information obtained from Metroplex as to required capital outlay costs of approximately \$166,000 in connection with Southeast's proposed use of the Gannett site, and other associated lease costs with respect to WHYI's two sites, Southeast proposed a \$200,000 figure for transmitter and antenna site costs in its revised budget, resulting in an increase of its construction costs from \$225,000 to \$425,000. (Southeast Ex. 3, p. 3)

**C. Funds Available To Meet Revised Construction and Operating Costs**

267. Southeast, in order to meet the higher costs it now estimates it would incur in the construction and initial operation of its proposed facility, obtained a new loan

letter, dated July 29, 1987, from CMNY. The letter is identical in every respect to the 1986 letter, except that it increases the amount of the loan from \$600,000 to \$900,000. (Southeast Ex. 3, p. 3, and att. 6)

268. The \$300,000 increase includes \$200,000 to cover Metroplex's site acquisition and rental costs and \$100,000 "to provide [a] cushion for other adjustments that we might need to make in the budget." (Southeast Ex. 3, p. 3; Tr. 1869) During a telephone conversation after the financial issues were added against Southeast, Boyce and Butler agreed that the former would contact Davidoff and seek an increased loan assurance. (Tr. 1869-73, 2283)

269. When Boyce contacted Davidoff, a general partner of CMNY, he approved the loan increase without asking for documentation of the need to raise the loan amount. Davidoff was told that there was a need for "further working capital." He did not request any details. (Tr. 3049-52, 3182-83)

270. Davidoff did not discuss his decision to approve the loan increase with anyone at CMNY or with Butler. He never received any written verification that Butler authorized the increase to \$900,000. Until the submission of the written testimony of the limited partners in October 1987, in connection with the hearing, Davidoff had no written verification from them that they knew of the revision in the loan amount or that they were willing to provide the necessary guarantees for the higher amount. (Tr. 3052-55)

271. As set forth in paragraphs 142. and 225., *supra*, the commitment for the 1986 CMNY loan letter in the amount of \$600,000 was made by Davidoff at the May 16, 1986, meeting in New York. At the hearing, Davidoff explained that CMNY "typically" requests a business plan from a company seeking financing and sometimes balance sheets, profit and loss statements, and projections of future earnings. None of these documents was requested or provided prior to his approval of the Southeast loan at the May 16, 1986, meeting. (Tr. 2832-33, 2934, 3169) Nor did Davidoff, at that time, request any information regarding the financial qualifications of Grossman, Holland, Katten, or Gerald Cohen, the Chicago Group. (Tr. 2898-2900) Davidoff has no specific knowledge as to the "financial condition and repayment ability" of Katten, Holland, Grossman, Gerald Cohen, or Butler. Davidoff has never seen a balance sheet or other documented evidence of financial capability for Perry, Baer, Mrs. Baer, or Levin. He hardly knew Levin when the latter acquired a portion of Baer's interest in 1986. (Tr. 2901-02, 3013-14)

272. Davidoff claimed that he had a "pretty good feeling" regarding the finances of the Southeast partners. (Tr. 3003) However, when questioned as to its basis, he cited "[m]y general knowledge" of Perry, Baer, Levin and Mrs. Baer and the roles they played in the financial community. (Tr. 3004)

273. When counsel proposed a figure of \$600,000 for CMNY's financing at the May 13, 1986, meeting, no explanation as to the basis of this figure was requested by Davidoff or offered by Cohen. Davidoff did not request an itemization of the costs represented by the \$600,000 request. He personally had no experience with respect to the capital needs of a major-market radio station and made no effort to educate himself at the meeting. Davidoff explained that his decision to become involved in Southeast was based on what he believed to be the intrinsic value of the station which he was told by Cohen to be in the "tens of millions" of dollars. He was told the

same thing by Perry. (Tr. 2886, 3186) Davidoff, who had never before met Cohen or Berfield, did not ask whether counsel had any experience in evaluating radio stations' worth, or whether they had ever owned or operated a station. However, he knew that Perry was an experienced broadcaster. (Tr. 3146-48, 3152-53, 3185-87)

274. Davidoff likewise did not ask at the May 1986 meeting about WHYI's revenues, ratings, or Southeast's proposed format or anticipated cash flow. He did not inquire of Cohen and Berfield whether Southeast's proposed station was to be a "start-up" business, or whether they anticipated profits or losses during the initial period of operations. Davidoff was not given a staffing proposal for the proposed station, was not told whether existing management would be retained, and did not ask whether a transmitter site for the proposed station would be available. Davidoff did not consult with anyone else at CMNY as to whether the Southeast 1986 loan was prudent. (Tr. 2935-38) As of the hearing, CMNY had not been furnished any information regarding the financial condition or revenues of Miami-Ft. Lauderdale stations or of WHYI, and Davidoff had never seen any of Southeast's financial documents, such as its estimated costs of construction and operation. (Tr. 3049, 3149-50, 3187)

275. As noted in paragraph 226., *supra*, Butler became aware of the CMNY loan commitment at her June 13, 1986, interview. Davidoff did not, at the June 13, 1986, meeting, ask Butler, before offering her the position, whether she would employ experienced management personnel at the station, although Davidoff acknowledged how important management of prospective portfolio companies is to his company. He disclosed at the hearing that if Butler were not to hire experienced staff, it is "rather unlikely" that CMNY would make a loan to Southeast. CMNY has not yet determined whether the final loan agreement with Southeast will have provisions regarding proposed managerial employees. (Tr. 2996-99)

276. On July 24, 1986, Cohen sent Davidoff a draft of what he called a "swiss cheese" loan letter to be sent by CMNY to Southeast. Davidoff did not discuss the letter with anyone at CMNY or with Cohen, and he made no suggestions for changes in it. Davidoff did not know what the term "swiss cheese" meant and did not inquire; he assumed that it indicated the letter was "innocuous" or "standard." Davidoff, who considered his letter to be a letter of intent, read it carefully, and he intended to be bound by its terms. (Tr. 3031-34) Pursuant to instructions in Cohen's transmittal letter, Davidoff had the letter retyped on CMNY letterhead, without revisions, dated July 28, 1986, and sent it to Cohen, who gave a draft of the letter to Butler at their July 30, 1986, meeting and transmitted the executed version, dated July 28, 1986, to her on August 5, 1986. (Metroplex Exs. 16 and 17; Tr. 3029-32) The July 24 draft was the first Southeast loan letter Davidoff had seen. However, he and Cohen, but not Butler, had earlier discussed the basic parameters of the terms. (Tr. 3000-01) Davidoff typically negotiates with an authorized representative of a borrower. However, he has never been told that either Cohen or Berfield was authorized to negotiate on behalf of Southeast with CMNY. (Tr. 3026-27) Additionally, Davidoff never inquired of Cohen whether Butler approved the letter's terms. (Tr. 3001) Davidoff was told by Cohen in the summer of 1986 that all the partners were willing to meet the collateral terms of the CMNY 1986 loan letter. (Tr. 3156)

277. The last paragraph of the July 28, 1986, CMNY loan letter reads as follows:

We understand that the FCC does not require a contractually binding commitment from us at this time, and this letter is not such a commitment. We do intend by this letter to assure you and the FCC of our desire and intention to make the loan available on the terms and conditions indicated. Funding of the amount indicated, or any part thereof, will be subject to formal approval by CMNY after its review of Southeast Florida's financial condition and each of its partner's financial condition and repayment ability, and the execution of a loan agreement incorporating those terms and conditions that we may deem appropriate, as well as the availability of funds at the time the loan agreement is executed.

278. Davidoff acknowledged that the final paragraph of the CMNY loan letter was entirely Cohen's language. Davidoff had not approved it in advance of receipt, and he did not ask Cohen what it meant; nor did he consult with CMNY's counsel regarding its impact on CMNY's rights. (Tr. 3002-03, 3028-29)

279. CMNY has not yet determined whether it will charge a loan fee for the Southeast financing. While Davidoff would be inclined to waive the requirement if he had to make the decision now, he was unwilling to give up the option to impose a fee in the future. CMNY does not routinely charge loan fees. (Tr. 3028, 3151, 3189) CMNY will require Southeast to provide a life insurance policy on Butler, although it has not asked for it yet. While Davidoff assumes there will be no problem obtaining the policy, his basis for that assumption is only his experience in other cases. (Tr. 3039-40)

280. CMNY, a Small Business Investment Company (SBIC), is in the business of making investments and loans to qualified small businesses. (Tr. 2828) Davidoff has never been given written or verbal authorization to agree to the Southeast loan by anyone at CMNY. He has never disclosed the loan to any of his colleagues at the company. He believes that such authorization is not necessary because "that's completely in my province." Further, it is not his practice to consult with his partners about potential loans. (Tr. 3047, 3145-46, 3179-80) While it would have been proper practice for Davidoff to have "given a notation" to his accountant to list the loan as a contingent liability of CMNY, that was not done in this case due to "an error in recordkeeping." This failure violates the Small Business Administration's requirements. (Tr. 3146, 3172-80, 4250)

281. Subsequent to the date of the 1986 loan letter, CMNY changed from a corporation to a limited partnership. Davidoff has not consulted the CMNY limited partnership agreement regarding his authority to make investment decisions without consulting the other general partners. However, in his own mind he believes he is entitled to do so based on years of following the practice. He believes that if his partners were not satisfied with his performance, they would notify him. To the best of his knowledge, Davidoff's partners are not aware of his "performance" regarding the Southeast loan. (Tr. 3094-95)

282. Davidoff conceded that it was quite important to CMNY in 1986, and remains important, that it maintain a first security position with regard to Southeast's assets.

(Tr. 3103-05, 3154-58) However, Davidoff has never inquired of Cohen or Butler whether the station's equipment will be purchased for cash, on what basis or from whom the equipment will be purchased, and, in particular, whether the supplier will require a first lien on it. CMNY had not imposed a requirement that the equipment be purchased by Southeast for cash. (Tr. 3189-91) Davidoff explained that CMNY would still make financing available to Southeast even if it did not have first position, but "under different circumstances for a different amount of interest." (Tr. 3203-04)

283. Each of Southeast's limited partners, including CMNY, submitted written testimony prepared in October 1987 representing that the partner has made all required capital contributions and that the partner --

agree[s] to the collateral provisions of the loan commitment letter dated July 29, 1987 from CMNY Capital, L.P. to Southeast.

(Tr. 2613, 3100-01, 3432-33; Southeast Ex. 5) Davidoff had no explanation as to why CMNY was agreeing to guarantee a loan to be made by CMNY. He conceded that, in his years in the investment business, he is not sure he has ever seen someone guarantee a loan to themselves. Davidoff suggested that "we're guaranteeing something, the way I understand it, to Southeast, not to ourselves." (Southeast Ex. 5, p. 9; Tr. 3018-19)

284. CMNY submitted to the Small Business Administration a financial report purporting to show the company's financial position as of May 31, 1987. The report, prepared under Davidoff's supervision, reflects that CMNY had total assets of \$52,166,775 and total liabilities of \$19,700,379. It further reflects a total of \$3,307,969 in "current assets" and a total of \$18,102,763 in "current liabilities." (Metroplex Ex. 83; Tr. 3058-60) Davidoff claimed that CMNY has a net worth of \$32 million and that CMNY at any time can readily obtain the \$900,000 to underwrite the Southeast loan from funds already lent or to be lent by the SBA or CMNY's parent or affiliated companies. CMNY has a \$7,000,000 line of credit from the SBA against which it had borrowed \$5,600,000 as of May 31, 1987. (Metroplex Ex. 83; Tr. 3079-93, 3151-99)

285. Davidoff maintained that monies already lent by the SBA to CMNY and categorized as "liabilities" on the financial statement constitute funds available for the CMNY loan. (Tr. 3080-84) He also relied on a line of credit that he maintained was available from the SBA. However, he acknowledged that CMNY's financial report on its face does not support this claim. (Tr. 3084) Davidoff expressed the view that there was no question in his mind as to CMNY's ability to honor its commitment to Southeast. (Tr. 3079-87)

#### IV. Section 317 and 47 C.F.R. 73.1212 Issue

286. As noted in paragraph 5, *supra*, the issues were enlarged to determine whether Metroplex, in the operation of Station WHYI during the period February 1, 1982 to date, violated Section 317 of the Act and/or 47 C.F.R. 73.1212 and, if so, the effect on Metroplex's basic qualifications to be a Commission licensee.

287. WHYI, a Contemporary Hit Radio (CHR) station, played primarily records of the music "sound" and style that characterize CHR music. Frequently, records have appeal across various formats. A particular record having the Black/Urban sound might also be played by a CHR station because it has appeal to CHR listeners as well. Such records are known in the music industry as "crossovers." WHYI frequently included Black/Urban, Adult Contemporary, or, to a lesser extent, Album Oriented Rock (AOR) crossovers on its playlist. (Metroplex Ex. 3, ¶ 5)

#### A. Metroplex's Policy and Controls re Sponsorship Identification

288. Since Metroplex acquired WHYI in 1978, its policy has been that the station and its employees must comply with all applicable FCC rules and regulations, including those pertaining to sponsorship identification of broadcast matter. (Metroplex Ex. 1, ¶ 135) The playing of records on the air in return for payments or gifts from record companies or their representatives has been forbidden. (Metroplex Ex. 2, ¶ 7; Tr. 638) Wain, Metroplex's Chairman and Chief Executive Officer, explained that, even beyond FCC concerns, Metroplex has been especially mindful of "payola" because the playing of records based on clandestine payment to employees harms the station's economic interest in playing only the records that appeal to the station's audience. (Tr. 973, 1014)

#### (1) Metroplex Employee Handbook

289. WHYI's payola policy is set forth in writing in the Metroplex Employee Handbook, which Metroplex adopted in 1978 or 1979 and which describes several important station operating policies that employees must abide by. (Metroplex Ex. 1, ¶ 136 and att. 37; Metroplex Ex. 2, ¶ 8) With respect to "payola," the Handbook states (Metroplex Ex. 1, att. 37, pp. 4-5; Tr. 804):

*Payola* - Payola is a Federal crime. Section 508 of the Communications Act provides that any radio station employee who accepts money or any other valuable consideration in return for the broadcast of program matter over his station shall disclose that fact to the public prior to such broadcast. Failure to make the required disclosure results in violation of Section 508. The criminal penalties for violation are a fine up to \$10,000 or imprisonment for up to one year or both.

The National Association of Broadcasters gives the following examples of payola:

- (1) An announcer accepts money, food, payments on his car, or other benefits in exchange for an understanding that he will play certain records in his programs and this fact is not disclosed prior to the broadcast of such records.
- (2) An announcer makes a recording for a fee and royalties with the understanding that the record will be played over the station and this fact is not disclosed prior to the broadcast.
- (3) An announcer participates in outside activities such as dances or other entertainment, either as a financial backer or a paid performer. In order to

increase his income from the event or to insure its success so he will be called upon for other performances, he broadcasts promotional announcements for the event without disclosing his involvement to the public.

Section 317(c) of the Commission's Rules states that "The licensee for each standard broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with program matter for broadcast, information to enable such licensee to make the announcement required by this section.

The method by which the Metroplex Stations exercise that diligence is to distribute an affidavit to employees with direct or indirect access to programming decisions. The first portion of the affidavit deals with payola and is intended to "prevent, as well as detect, the occurrence of any activity which could be viewed as unethical, improper or unlawful.

In no way should the requirement that the affidavit be signed and returned periodically be viewed as a reflection on any employee's honesty or integrity.

General Managers are required to check on "outside" sources such as talent, suppliers, sales agents and other independent contractors, to ensure that the disclosures required under Section 508 are made as necessary.

290. The Handbook, with this statement of payola policy, was given to WHYI employees when they commenced employment at WHYI. The Handbook emphasized that the guidelines set forth, *supra*, must be "known, understood and accepted" by every employee. (Metroplex Ex. 1, att. 37, p. 4) Additionally, employees were required to acknowledge in writing that they had received the Handbook, would become familiar with its contents, and would comply with the company's policies. (Metroplex Ex. 1, ¶ 136, att. 38; Metroplex Ex. 2, ¶ 8; Tr. 647) However, there was no follow up to ensure that the employees had, in fact, read the Handbook. (Tr. 804) It was also Metroplex's policy to have the General Managers discuss the payola policy with the newly-hired programming employees, such as Program Directors and Music Directors, so as to emphasize to them the importance that Metroplex attached to its payola policy. (Metroplex Ex. 2, ¶ 8) When a new Program Director, Richard Ugarte (Ugarte) was hired at WHYI in August 1986, Ross reviewed the station's policies with him and stressed the importance of ensuring against any payola violations. (Metroplex Ex. 1, ¶ 139; Tr. 645)

#### (2) Employee Affidavits

291. Since 1978, Metroplex has periodically required the execution of payola affidavits by its employees. (Metroplex Ex. 1, ¶ 137 and att. 39; Metroplex Ex. 2, ¶ 9; Tr. 632, 967) The text of the affidavit is as follows:

1. I have been employed in radio for METROPLEX COMMUNICATIONS of Florida Inc., since \_\_\_\_\_, 19 \_\_\_\_.

2. From that date, up to and including the date of my execution of this affidavit, except as hereinafter expressly qualified, I have not done any of the following acts:

(a) I have not solicited, accepted, received or taken, directly or indirectly, any commission, money, property or other valuable thing as an inducement, bribe or reward for doing or omitting to do any act, or for showing any favor or disfavor in relation to the affairs or business of my employer.

(b) Without in any way limiting the scope of paragraph (a) hereof; I have specifically not solicited, accepted, received or taken either personally or through any member of my family, or through anyone acting on my behalf, or through the medium of any organization or enterprise in which I am interested, any commission, money, property or other valuable things as an inducement, bribe, or reward for, or as a condition of mentioning, exhibiting or performing, or causing to be mentioned, exhibited or performed, the name, business, product, work or performance, respectively, of any person, organization or enterprise on any program carried, broadcast or televised by WHYI-FM RADIO.

3. As a condition of my employment at WHYI radio, I will not in the future do any or [sic] the acts referred to in paragraphs 2(a) or 2(b) above.

4. During the aforesaid period of my employment I have not accepted or received any gift of substance or money in any amount except as listed below. In no case did I ever accept any gift or money as an inducement for doing or omitting to do any act in relation to the affairs of [sic] business of my employer.

5. Nothing contained herein is intended to, or shall prohibit receipt [sic] or acceptance of anything with the express knowledge and approval of my employer, but henceforth any such approval must be given in writing by someone expressly authorized to give such approval.

292. With reference to paragraph 4 of the affidavit, Ross maintained that it was implicit within the "spirit and intent" of that paragraph that it applied only to gifts of substance or money received to induce the playing of a record. (Tr. 635-36) According to Ross, the affidavit was designed to stress the importance of not accepting valuable consideration for broadcasting something. (Tr. 640-42) Similarly, Ross maintained that the "intent" of paragraph 5 was to require approval only of the receipt of "anything" as an inducement to play records. (Tr. 637) He commented:

You're not dealing with attorneys here, you're dealing with disc jockeys and people like myself.

(Tr. 638) Nonetheless, Ross agreed that he would have expected disclosure of gifts that were "tempting enough" to be inducement, irrespective of whether or not it was provided in return for the broadcast of something. This was a determination left to the employee's discretion. (Tr. 641-42) The station had not provided its employees any

written definition of what constitutes a "valuable thing" or "gift of substance." (Tr. 640-41) No gifts of substance were disclosed in any payola affidavit from February 1, 1982, until shortly prior to Ross' testimony. (Tr. 643-44, 941-42) No written permission has ever been given to permit the receiving of "anything pursuant to paragraph 5 of the affidavit. (Tr. 637)

293. Wain explained that the requirement for employees to execute the affidavit was designed to serve two basic purposes. First, it was meant to ensure that employees remain continuously aware that payola was a major concern of Metroplex. Wain believed that employees got that "message when they had to sign such affidavits periodically, especially since "payola" and "plugola" were the only matters about which Metroplex regularly required its employees to give affidavits. The second purpose of the payola affidavits, according to Wain, was to ascertain any instances in which employees received valuable consideration from record companies or others as consideration for playing records on the air. Wain further explained that by requiring employees to disclose a violation under oath, Metroplex sought not only to learn of a violation should it have occurred, but to further discourage an employee from committing a violation in the first place. (Metroplex Ex. 2, ¶ 9)

294. In Wain's view, the operative word in paragraph 4 of the affidavit which refers to "gift of substance" is the word "inducement. Wain acknowledged that the term "gift of substance" is a highly subjective matter, but emphasized that Metroplex meant a gift of substance which would be an inducement. (Tr. 942-43) With respect to the disc jockeys, Wain considered a gift of substance" to be something that would risk their jobs or their careers, or besmirch their name in the industry. According to Wain, it would have to be something "pretty big." Disc jockeys were told that a gift of substance would be "something strictly out of the ordinary. (Tr. 943-44) Wain acknowledged that the licensee did not make any effort to make the standard less subjective, leaving it to the judgment of the Manager, the Program Director or the other people at the station. (Tr. 943-44)

295. Wain talked to station employees "many, many times, advising them that a "gift of substance" would be "something strictly out of the ordinary." He identified one such meeting in June or July 1987, after "payola" had been raised in this proceeding. Another meeting he identified was a December 9, 1986, meeting of Metroplex Program Directors in Orlando. He was uncertain whether Robert Walker, then WHYI's Program Director, was present at that meeting. (Tr. 942-48)

296. Wain was of the view that receipt of a significant quantity of drugs would constitute a gift of substance, reportable on the payola affidavit, irrespective of whether it was in return for air play, since the purpose of the affidavit was intended to prevent "impropriety" as well as conduct illegal under the payola statute. Wain felt that this was implicit in the affidavit and the Handbook. (Tr. 981-85)

297. Metroplex principal Weiss conceded that the payola affidavit contained no explanation or definition of such terms as valuable thing or gift of substance. (Tr. 1360) He acknowledged that these concepts were not defined in terms of a dollar amount but by a rule of reason looking to whether the gift might turn someone's head, look bad or cause improper actions. (Tr. 1360-62) Weiss

opined that the receipt of drugs from a record industry source for recreational drug use should be reported on the payola affidavit, since that would be something management would like to know about. He indicated that receipt of drugs would not necessarily induce the employee to do something; however, it was something they would like to know about. (Tr. 1368-70)

298. With reference to paragraph 4 of the affidavit, Weiss agreed that the first sentence as written required disclosure irrespective of whether there was an inducement to do something. He noted, however, that the second sentence was conditioned on the acceptance of items as an inducement. He suggested the two sentences should have been joined together by the word "and." (Tr. 1370-71; 1373-74) He was unaware whether this was explained to Metroplex employees. (Tr. 1374-75) However, he agreed that a gift of \$500 from a record representative would have to be reported irrespective of whether it was an inducement. He suggested that a rule of common sense would govern. (Tr. 1375) He indicated with respect to gifts valued at \$100 that such gifts would require disclosure irrespective of whether there was an inducement. (Tr. 1377)

299. WHYI employees have been required to execute such affidavits at least every six months. (Tr. 966-67; Tr. 1116) Approximately 400 signed affidavits have been obtained over the years. (Metroplex Ex. 1, ¶ 137)

300. Frank Amadeo was never told orally or in writing what constituted a gift of substance. (Tr. 1120) The term valuable thing was never defined in writing or orally except that Ross told him a record company could not pay for trips. (Tr. 1128-29) Robert Walker had no recollection of discussions with management relating to the purpose and scope of the affidavit. (Tr. 1706-08)

### *(3) National Association of Broadcasters' (NAB) Memorandum*

301. In late 1979, WHYI distributed to its employees a memorandum issued by the National Association of Broadcasters (NAB) addressing the subject of payola. (Metroplex Ex. 1, p. 76) The memorandum was distributed pursuant to a December 17, 1979, letter from Wain to Ross in which he instructed Ross to have the entire air staff read the NAB memorandum and sign documents acknowledging that they had read it and "thoroughly understood it. Ross was to discuss it with them if they did not. (Metroplex Ex. 1, att. 40, p. 1; Metroplex Ex. 2, ¶ 10)

302. The NAB memorandum was again distributed to WHYI's employees in April 1986. The memorandum had not been distributed during the period 1980-April 1986 because there was almost no turnover of air staff during that period. (Tr. 805) Following media reports of alleged "payola activity in the broadcast industry, the need to maintain continuing payola controls was discussed at a meeting of all Metroplex station General Managers in April 1986. After the meeting, Wain sent copies of the NAB payola memorandum to the General Managers with instructions to have their staffs review it. (Metroplex Ex. 1, ¶ 138 and att. 41) Wain expressly cautioned that although the NAB memorandum had been written in 1979, "the rules have not been changed." (Metroplex Ex. 1, att. 41) Ross, in turn, distributed the NAB memorandum to WHYI's Program Director, Robert Walker, and Music Director, Frank Amadeo, with instructions to:

[M]ake sure and read the attached NAB notice on Payola and Plugola. You should keep copies of this in your file and please share this information with all the disc jockeys in your next meeting.

(Metroplex Ex. 1, ¶ 138 and att. 42, p. 1) Ross also gave instructions that the station's air personalities acknowledge in writing that they had read the NAB memorandum. Signed acknowledgments were obtained from employees attesting that they had read and understood the memorandum. (Metroplex Ex. 1, ¶ 138 and atts. 41-44) Walker distributed the NAB memorandum to the disc jockeys, as instructed. (Tr. 1716)

303. In August 1986, Ross provided a copy of the NAB memorandum to Ugarte, the station's newly-hired Program Director, and told him to read it. (Tr. 645) In early 1987, Ugarte distributed the NAB memorandum to all the disc jockeys at a staff meeting. (Tr. 645-46)

304. Wain explained that Metroplex distributed the NAB memorandum not as Metroplex's statement of "payola" policy, but because he felt it would be useful in focusing the attention of Metroplex's employees on areas where they should be careful. He also felt that the memorandum would create an atmosphere that would reemphasize to employees Metroplex's concern about "payola." (Metroplex Ex. 2, ¶ 10; Tr. 1013)

305. The NAB memorandum, dated November 1979, was written by Jason Shrinsky (Shrinsky). It is headed "Counsel from the Legal Department" and is based on a presentation made at the NAB Radio Programming Conference of September 10, 1979. (Metroplex Ex. 1, att. 40, p. 2) As noted, Shrinsky was and is an attorney for Metroplex. The NAB memorandum contains various hypotheticals, including the following:

**Question :** If a record company flies a program director and his wife to another city to see its artist in concert, is that considered payola?

**Answer :** Probably yes. A trip to Las Vegas to see the opening of a particular artist's show constitutes payola to the powers that be at the FCC. The same would be true if a record company flies a program director, announcer or music director to another city to see a sporting event or to purchase a new wardrobe.

**Question :** Can a program director accept gifts from record companies for Christmas and if so, is there a value limit on them of \$25?

**Answer :** As a general matter, a program director can accept a gift at Christmas time. *The \$ 25 limitation is arbitrary but nevertheless, has come to be a standard of the industry.* The rationale being that the more expensive the gift, the greater the inducement to "return the favor" to the record company so that the record company, rather than the program director, becomes the benefactor. In other words, a Christmas gift should be a reasonably priced, as opposed to a luxury item. *However, any gift received by any disc jockey, program director and / or music director should be reported to the station's management.* (Emphasis added.) (Metroplex Ex. 40, att. 40, p. 3)

306. The NAB memorandum, in pertinent part, recommended (Metroplex Ex. 1, att. 40, p. 7):

*Procedures for the Music Committee or Program Director.* Most stations have a Music Committee or Program Director appointed by the General Manager who is responsible for meeting with representatives of record companies. No record promotion personnel are seen except on the scheduled day. *A log might be kept (see Attachment A) of the name of each promotion person, record company represented, date and time seen, and whether a gift was presented. Even gifts of nominal value (calendars, coffee cups, ash trays, etc.) are entered on the log.* The log is signed by the person keeping it, which generally will be the Music Director or Program Director. However, when any employee receives a gift from a record company (for example, a Christmas gift for the Program Director), the recipient is expected to make the appropriate entries on the gift logs and sign in the appropriate space. The logs might be inspected weekly by the General Manager and reasons for any inordinately long visits or large gifts

should be explained and accounted for by the Music Committee or Program Director. (For other suggestions on dealings with record companies and record promoters, see Appendix IV-I of the NAB Legal Guide.) (Emphasis added.)

Attachment A referenced in the above paragraph is a sample form of a worksheet and log designed to record the name and record company affiliation of any visitor, the date, time in, time out and any gift brought. It was to be certified correct by the employee responsible for maintaining it. (Metroplex Ex. 1, att. 42, p. 9)

307. Ross expressed the view that the NAB memorandum did not reflect WHYI's policy *in toto*. He believed the NAB memorandum to be too conservative and unduly impractical and far too cumbersome. (Tr. 648-51) Ross believed the suggestion re a log of visits by record company people visiting the station would be far too cumbersome. Ross believed that portions of the NAB memorandum were unclear. (Tr. 654) He had many problems with the NAB memorandum; however, he never advised anyone in writing of these problems. (Tr. 656)

308. Wain confirmed that the NAB memorandum was not Metroplex's payola policy, and explained that it "took an extremely conservative approach in many respects . . ." (Metroplex Ex. 2, p. 6) He did not advise anyone in writing of his reservations. He believed that the NAB memorandum went far beyond the definition of payola, and that it was superfluous since the station already had an effective payola policy. He thought the NAB memorandum's proposed restrictions on visits by record company representatives and proposed logging requirements were cumbersome. (Tr. 951-53) With reference to the \$25 limit on gifts from record company representatives indicated by the NAB memorandum, Wain indicated that he didn't know whether Metroplex ever had a specific amount as a guideline. He did not "necessarily" think that \$25 might have been a guideline in 1978. No specific guideline was ever put in writing for WHYI. (Tr. 955-56) Weiss indicated that while there was no dollar amount in Metroplex's policy, the \$25 limit is a guideline that the station would like to stay within, and above that a rule of reason would apply. (Tr. 1360-62)

#### (4) Corporate Efforts to Safeguard Against "Payola"

309. Periodically, Wain issued memoranda emphasizing the need to maintain effective controls to safeguard against "payola violations. In September 1984, Wain sent the following reminder to all Metroplex General Managers (Metroplex Ex. 1, att. 45, p. 1, emphasis in original):

*Payola - Conflicts of Interest* - All new employees must execute an affidavit acknowledging their understanding of and compliance with the policies of the FCC and Metroplex with respect to payola, plugola and conflicts of interest. We would like these affidavits executed every six months by all employees. If you do not have the affidavit currently in use, please call me. I'll be glad to send it to you.

In October 1984, Wain sent to all the General Managers copies of the Metroplex Employee Handbook for distribution to each employee, with instructions that all personnel read it and sign the certification page. (Metroplex

Ex. 1, att. 46) Again in January 1986, by memorandum, he asked the General Managers to be sure that all new employees had received and read the Handbook. (Metroplex Ex. 1, att. 47) In April 1986, he followed up a meeting of the General Managers with another memorandum directing that all new employees read the Handbook and that the managers make sure that all employees have signed the "payola" affidavit. (Metroplex Ex.1. att. 49, p. 2)

310. When the subject of payola received attention in the trade press in early 1985, Wain wrote to all Metroplex General Managers urging them to "re-double our efforts to make absolutely certain" that "payola" not occur at Metroplex stations. Wain wrote on April 13, 1985 (South-east Ex. 11, p. 1):

To this end, I want to recommend that you continue to make sure that all new employees sign the Payola affidavits. If the present employees have signed them, make sure that those payola affidavits are signed every six months.

The memorandum also directed the General Managers to continue using the committee system for deciding what records should be added to the playlist. Ross responded with a letter to Wain confirming that WHYI was regularly obtaining payola affidavits from its employees. (Metroplex Ex. 62)

311. In March 1986, Wain sent a memorandum to all Metroplex General Managers, Program Directors, and Promotion Directors, enclosing a recent *Wall Street Journal* article about "payola" allegations in the industry. The memorandum stated (Metroplex Ex. 1, att. 48, p. 1; emphasis in original):

Obviously Bob [Weiss] and I have absolutely no reason to believe that any Metroplex radio station has anything to worry about in the area of payola. However, as a precaution we would like you to give copies of this article to all deejays. Please discuss this memo and the article at the next meeting of your department heads. And, please make sure that a current copy of the Payola Affidavit is in everyone's personnel file.

Payola is serious business. And, in this era of increased deregulation we know from personal experience that the FCC is more zealous than ever in enforcing the remaining rules and regulations. *The FCC has never rescinded the payola rules.*

If you have any questions at all about this area, please call me. We don't want to be associated with any sort of conduct which can be construed as improper where the relationship with promoters or record companies is concerned.

312. As part of its program of supervision and control of its various radio stations, Metroplex held periodic meetings of all of its General Managers. Usually there were three or four such meetings every year. Ross, as General Manager of WHYI and Executive Vice President of Metroplex, attended these meetings. At these meetings, among other things, Wain reviewed with the General

Managers Metroplex's policies in key areas of FCC compliance. The subject of payola was discussed at many of the meetings. (Metroplex Ex. 2, ¶ 11; Metroplex Ex. 63) A payola discussion took place at the April 1986 managers meeting. (Metroplex Ex. 1, att. 41 and 49) In addition to these meetings of Metroplex General Managers, Wain held a meeting in Orlando in December 1986 with Metroplex's Program Directors, including WHYI's Ugarte (Rick Stacy) at which the subject of payola was discussed. (Tr. 947-48, 1012)

313. Wain frequently emphasized to Ross in person and in telephone conversations the need to maintain strong and effective controls to safeguard against payola violations. (Metroplex Ex. 1, ¶ 139; Metroplex Ex. 2, ¶ 11) Ross, in turn, had discussions on the subject with WHYI employees. (Metroplex Ex. 1, ¶ 139; Metroplex Ex. 3, ¶ 38) In August 1984, following a *Los Angeles Times* article about possible "payola," Ross met with Robert Walker, then WHYI's Program Director, to determine whether Walker was in any way involved. (Tr. 682-84; Metroplex Ex. 1, att. 50) Ross asked Walker whether he did drugs with record company representatives. Walker looked Ross "straight in the eye" and said no. (Tr. 684) He held a similar discussion with Walker in March 1986, following an NBC News story about "payola" allegations. Again, Walker told him that he was not doing drugs with record company representatives or employees. (Tr. 686-88; Metroplex Ex. 2, ¶ 14) Yet again in June 1987, Ross asked Walker if he participated in drug use with record company representatives or employees, and Walker denied "vehemently" being involved in any drug use. (Tr. 688-691) Ross also questioned Amadeo, WHYI's Music Director, in March 1986, to determine whether Amadeo was involved in drug use with record company representatives. Amadeo answered in the negative. (Tr. 691) Ross' role relative to the Grammy Awards incident is discussed, *infra*.

314. After a local newspaper story in March 1986 suggested that WHYI's Program Director, Robert Walker, may once have been offered "payola," Wain instructed Ross to discuss the matter thoroughly with Walker to determine whether any such thing had happened. After the discussion with Walker, set forth *supra*, Ross reported to Wain that he was satisfied that Walker had done nothing improper. (Tr. 1711, 1769-71) Thereafter, Wain sat in, by speakerphone, on an interview of Walker by the FBI about a week after the appearance of the newspaper story. The FBI told Wain that neither Walker nor WHYI was a target of its investigation, but that it was simply seeking information from Walker because his name had appeared in the newspaper story. Walker's responses to all questions at the interview gave Wain no basis to believe that Walker had ever taken payola or improperly affected WHYI's music playlist. As far as Wain knows, the FBI has made no further inquiries of Walker, nor has the FBI contacted WHYI since interviewing Walker. (Metroplex Ex. 2, ¶ 14)

#### (5) WHYI's Music Selection Process

##### (a) Music Committee Structure

315. The selection of music to be played on WHYI was made each week by the station's Music Committee, which has been in place since Metroplex acquired WHYI in 1978. The members of the committee were the Program Director, Music Director, and Music Research Director.

In times past the position of Assistant Program Director was held by a fourth person who would attend Music Committee meetings. Frank Amadeo presently hold the positions of Music Director and Assistant Program Director. Meetings of the committee were open to any other station employee who wanted to attend. It was the committee's function at each weekly meeting to make decisions in two areas: (1) which new records to add to the playlist and, conversely, which old ones to drop; and (2) the "rotation" of each record on the playlist, namely, how frequently and during which parts of the day to play each record. These decisions were made after discussion among the committee members. In the case of new releases being considered as possible "adds," the committee members also listened to those records at the meeting. Most of the time the discussion resulted in agreement among the committee members as to record rotation and what records to add. In cases where there was disagreement, the members of the committee discussed their differences before a decision was made. (Metroplex Ex. 3, ¶ 8) The Program Director had the final decision. (Metroplex Ex. 1, ¶ 140; Metroplex Ex. 2, ¶ 12; Tr. 1165-66, 1232)

316. The committee system was designed to minimize the possibility of payola influence by involving more than one person in the decision making process. (Metroplex Ex. 1, ¶ 140; Metroplex Ex. 2, ¶ 12; Metroplex Ex. 3, ¶ 8; Tr. 893-94, 1165)

#### (b) Record Selection Criteria

317. WHYI, a top 40 radio station, played familiar hit records and familiar hit artists. (Tr. 146) It was known as a Contemporary Hit Radio (CHR) station. (Metroplex Ex. 3, p. 4) The WHYI Music Committee applied objective and subjective criteria in making selections. The regularly applied criteria included the following: local popularity of a record as indicated by record sales in the area and by WHYI's call-out research; the extent to which WHYI listeners were calling in to request a record; the current position and trend of a record on national charts, published in the weekly trade press; the air play being given to a record by stations having the same format as WHYI in its market and other markets, especially with comparable demographics; the popularity a record was demonstrating on television music video programs or as part of a current hit movie; the subjective judgments of those on the Music Committee as to the quality of a record and its likely popularity with WHYI's listeners; the achievement of a proper blend of music sound to appeal to the tastes of all segments of WHYI's audience; the current topicality of a particular song or artist by reason of a news event, local concert appearance, etc.; the involvement or expected involvement of an artist in an upcoming WHYI local concert presentation; the reputation and history of chart success of an artist whose record had been released; and the input from WHYI's professional independent programming consultant paid by the station to review and comment on WHYI's music selection. The station's music selection decisions were made by combining and weighing these criteria together. (Metroplex Ex. 1, ¶ 161; Metroplex Ex. 3, ¶ 9; Tr. 1285-88) Amadeo had the initial responsibility of bringing records to the attention of the committee for their consideration. Ross acknowledged that the criteria changed from time to time. (Tr. 657)

318. Ross, WHYI's part-owner and General Manager, characterized the application of these criteria as both an art and a science. Ross explained that selection of music

that had gained or was about to gain widespread popularity was essential to WHYI's success; if WHYI played music that large numbers of listeners did not want to hear, the listeners would quickly turn to another popular music station in the market; if WHYI was too late in adding a record that large numbers of listeners wanted to hear, the listeners would have turned to another station in order to hear that record. In Ross' view, because loss of listeners means loss of ratings, with resultant loss of advertising revenues for the station, WHYI could not play the wrong records and succeed in a competitive market. (Metroplex Ex. 1, ¶¶ 158-160)

319. Amadeo, WHYI's Music Director and Assistant Program Director, agreed with Ross that, because WHYI's success was dependent upon its appeal to listeners, it was essential to provide listeners with the music they wanted to hear when they wanted to hear it, as well as to predict what records listeners would find appealing before their popularity was fully established. (Metroplex Ex. 3, ¶ 4) Both Ross and Amadeo stressed the importance of judgment or intuition in selecting the music to be played on the station. (Metroplex Ex. 1, ¶ 160; Metroplex Ex. 3, ¶ 9)

#### (c) WHYI's Playlist

320. WHYI's weekly playlist was a listing of all of the current records that the station played in regular rotation that week.<sup>20</sup> The number of records on the playlist each week has varied over the years. At times in the past WHYI had listed 40-45. The playlist presently includes the "Top 30," (formerly the Top 40), which are the 30 songs that WHYI has determined are the most popular current hits in its market. In addition, the playlist includes several other current records which, although not ranked in the Top 30, are deemed to merit limited airplay; these unranked records are denominated on the playlist as "adds" or "on." (Joint Ex. 2, ¶ 2 and pp. 3-4; Metroplex Ex. 1, att. 75, p. ii) The relative numerical ranking of the Top 30 records on the playlist reflected WHYI's assessment of their relative popularity in the market. The playlist ranking did not necessarily reflect the amount of airplay that WHYI was giving each record in relation to the other records on the list, although new records generally received less airplay than established hits, and records that were on the playlist but not ranked on the Top 30 chart were not played heavily. (Tr. 714-15, 1147; Metroplex Ex. 3, ¶ 7; Tr. 1671-72)

321. WHYI's weekly playlists, along with those of other stations nationwide, were and are published in *Radio & Records*, a weekly trade publication that charts popular music based on information it gathers each week from radio stations throughout the country. In addition to the playlists of individual stations, *Radio & Records* shows how many reporting stations are playing a particular record and where the record ranks on the national chart. *Radio & Records* is regarded in the radio and music industries as an authoritative source on the current performance and popularity of particular records both nationally and in specific radio markets around the country. (Joint Ex. 2, ¶ 2; Metroplex Ex. 1, att. 75, p. i; Tr. 1660-61)

#### (d) Record Rotations

322. The "rotation" of a record refers to the frequency with which it is played and the dayparts during which it is played. (Metroplex Ex. 3, ¶ 8) The more popular records are played more often than the others. WHYI's

rotation categories included: "Powers," the 5-8 most popular records, which were played with the greatest frequency; "subpowers," which were approximately 13 records, were played less frequently than "powers; and new records, which were played less frequently than "powers or "subpowers." (Tr. 1146-47) Because the composition of WHYI's audience varied at different times of the day, some records were played only in certain dayparts to appeal to a particular audience. For example, a record that appealed to teenagers but not to housewives might be played in the morning before school hours, when teenagers are listening, but not during midday hours, when housewives are listening. (Tr. 974, 1666-67)

323. There were two basic rotations: 5:00 a.m. to 10:00 p.m., which primarily included the top 30-35 records plus adds and ons and a second rotation from 10:00 p.m. to 5:00 a.m. during which time there were fewer commercials and thus more time to experiment by also playing test records. (Tr. 1148, 1289-90) The decision to put test records, which were each played at least once each night, on the air was made by the Music Committee at its weekly meeting. It was felt that it was not possible to get much of a listener reaction if the test record were played less frequently. (Tr. 1150) The criteria for selecting the test records was similar to those used for the regular records, the most important being the subjective opinion of committee members as to the potential appeal of a record. (Tr. 1285) These test records were also programmed into the computer to determine when during the 10:00 p.m. to 5:00 a.m. rotation period they were to be played. (Tr. 1157) During the period from January 1983 to June 1984, there were approximately 180 test records broadcast. (Tr. 1291)

324. At its weekly meeting, WHYI's Music Committee decided the rotation category to which each record on the week's playlist would be assigned. (Metroplex Ex. 3, ¶ 8; Tr. 1148) That information was fed into the station's computer, which then scheduled the order of play. (Metroplex Ex. 3, ¶ 10; Tr. 1147-48, 1672-73)

325. The computer programming for the scheduling of records worked in the following manner. Each hour of the day was broken into segments. Categories of records, not specific records were assigned to each of the hourly segments. Also in the computer was a list of records for each of the categories. Based upon the input to the computer program, the computer then identified the specific records to be played. (Tr. 1672-73) Music Director Amadeo prepared and Program Director Walker approved a sheet called the "music log" which then instructed the disc jockeys which records to play and when. The records to be played were converted into cartridges for use by the disc jockeys when they were on the air. The disc jockeys were allowed virtually no discretion to play records that were not in the music log or to play records in different order from that listed on the music log. (Metroplex Ex. 1, p. 78; Metroplex Ex. 3, ¶ 10) The only exceptions were that (1) if a disc jockey received numerous listener requests for a very popular record, he might play that record more frequently than the music log prescribed in order to satisfy the listener requests (Tr. 1676, 1737), and (2) if it developed that not all of the prescribed records could fit into the hour in which the computer had scheduled them, the disc jockey might make the necessary adjustment by dropping a record, usually an "oldie. (Tr. 1738) Walker acknowledged, however, that it was physically possible for a disc jockey to play a record cartridge

other than that programmed by the computer and listed on the music log. There were no physical controls to prevent it and it was Walker's job to monitor such matters. (Tr. 1676, 1737-38) Walker, WHYI's Program Director from the beginning of 1983 until June 1986, maintained that he constantly monitored the on-air performance of his disc jockeys and was aware of no instance in which any of them abused this system. (Tr. 1739)

**(e) WHYI's Program Consultant**

326. As a further effort to safeguard against payola violations, WHYI relied upon a paid professional programming consultant. From 1983 until latter 1986, the consultant was the firm of Burkhart, Abrams, Douglas, Elliot and Associates, Inc. (Burkhart, Abrams). In latter 1986, WHYI retained the firm of Jon Sinton Associates as its consultant. Jon Sinton is a former employee of Burkhart, Abrams. The consultant reviewed WHYI's playlist on a weekly basis with the station's music selection personnel, discussed with them the records being considered for addition to the playlist, and made recommendations about what records to play and what records not to play. Because, in Metroplex's view, the consultant was thoroughly familiar with the music played by WHYI and the music played by stations with similar formats around the country, Metroplex had confidence that the consultant would detect any "suspicious" additions to WHYI's playlist and alert WHYI's management. (Metroplex Ex. 1, ¶ 141; Metroplex Ex. 2, ¶ 13; Tr. 897)

327. On one occasion in August 1984, after a newspaper reporter had suggested that WHYI was involved in possible "payola," Ross specifically discussed the matter with WHYI's programming consultant, Dwight Douglas (Douglas) of Burkhart, Abrams. Ross, on the basis of that discussion, concluded that WHYI was free of any violations, but asked Douglas to report to him on Douglas' weekly programming discussions with WHYI's Program Director, Walker. In relying upon Burkhart, Abrams to be alert for indications of any payola violations at WHYI, it was Metroplex's understanding that Burkhart, Abrams was familiar with the FCC's "payola" rules, as demonstrated by the "payola affidavit" executed by Burkhart, Abrams in conjunction with the playlist worksheets that WHYI received from that firm monthly. (Metroplex Ex. 1, att. 50-51; Metroplex Ex. 2) The "affidavit" is not an affidavit or a declaration under penalty of perjury. It relates only to the consultant's own obligations and does not establish its ability to detect payola at the station or its intention to be alert for such violations. Sinton, the present consultant, is not required to provide this "affidavit." (Metroplex Ex. 1, p. 80) In this respect, Burkhart, Abrams supplied a weekly worksheet setting forth its playlist and rotation suggestions. Amadeo acknowledged that this would not be useful in detecting payola, except in the event of an "outlandish" discrepancy between the worksheet and the WHYI playlist. (Tr. 1234) This "affidavit" was the basis for concluding that Burkhart, Abrams was fully aware of the payola rules and gave Ross confidence that the firm would be alert for any payola violations at the station. (Metroplex Ex. 1, ¶ 141 and att. 50)

**B. Employees' Understanding of WHYI's " Payola " Policy**

328. Frank Amadeo maintained that Ross had always been adamant with the station's staff that any form of payola was unacceptable and would not be tolerated. According to Amadeo, in addition to requiring periodic

payola affidavits, and distributing memoranda on the subject, Ross, over the years, had stressed the station's policy at staff meetings and in discussions he has had with them. As a result, Amadeo had never been in doubt that it was contrary to station policy to play any music on the air in return for receiving something from a record company. (Metroplex Ex. 3, ¶ 38; Tr. 1124) Amadeo asserted that he had never violated this policy and that he knew of no instance where any other employee had violated it. (Metroplex Ex. 3, ¶ 38) Amadeo further explained that it was his understanding that "it was Metroplex policy that we were not to accept any sort of gifts or anything, you know to induce us in any way." (Tr. 1124) He acknowledged that there was no specific Metroplex policy as to what was permissible and what was not permissible in terms of dollars. (Tr. 1140) He said that determining whether a gift was valuable required a subjective determination and depended on what the gift was. (Tr. 1305-06) Amadeo considered a \$100 watch and, probably, a \$50 watch to be valuable, but not a \$25 watch. (Tr. 1138-40) As a further illustration, he considered a stereo system to be valuable but not a pocket radio. (Tr. 1306) He considered electronic equipment, trips, and expensive jewelry to be valuable. (Tr. 1124) Had he been tempted to accept any gift that he thought to be of value, he would have consulted with Ross to see if it was allowed. (Tr. 1138-41) Amadeo admitted that he had received birthday and Christmas gifts from Margaret Ann Ronayne, who promoted records for Motown, and also from Steve Jones, a record representative for Atlantic records. Amadeo explained that they had been close personal friends and that their families had exchanged gifts for quite some time. He did not note the gifts on his affidavits because he did not consider them to be an "inducement." (Tr. 1130-32)

329. Robert Walker recalled an occasion where he was asked by Ross if he engaged in "payola." This was at a time when the matter was being discussed in the trade press. (Tr. 1709-10) He did not recall being asked any questions about his affidavits when they were submitted by him. (Tr. 1712) His understanding of the "payola" affidavit was that it "was a document swearing that he was not receiving unduly valuable consideration or valuable consideration as an inducement for playing records on Y-100." (Tr. 1713) He explained that the only consideration that ever concerned him was "whether Y-100 or [he] indulged in practices of putting records on the air in return for anything other than the normal criteria for airplay on Y-100". (Tr. 1598) It was clear in Walker's mind while he was Program Director at WHYI that the management of Metroplex would not tolerate payola. (Tr. 1764)

330. According to Walker, any sum of money or any gift that was extravagant, unusual, or outside the realm of normal business promotion in the radio and record industry "[w]ould have rung a bell" with him as constituting what he understood to be "payola." (Tr. 1714-15) However, he did not attribute a dollar value to what constituted a gift of substance: "It was strictly a personal judgement type of thing. The situation didn't occur where I had to, in my estimation, make that kind of judgment. I was not being given televisions . . . ." (Tr. 1712) Explaining why he never reported anything on his payola affidavits, he said: "There was never anything that rang a bell with me. There was nothing extravagant that I could think of to put on these affidavits and so I never put anything on them . . . ." (Tr. 1730)

### C. Management's Understanding of WHYI's " Payola " Policy

331. According to Ross, WHYI's General Manager, the "spirit and intent" of the payola affidavit was "to prevent the inducement of taking something in order to play a record on the air." (Tr. 635) He was of the view that a gift of substance was to be disclosed to management even if it was not given in return for broadcasting something on the air. In Ross' words, "if someone gave the program director a Cartier watch, he'd better tell me about it." The criterion for disclosure to management, according to Ross, was whether, in the employee's judgment, the gift was "something that would be tempting enough for an inducement to play a record. (Tr. 641-42)

332. Wain, Metroplex's Chairman and Chief Executive Officer, expressed the view that what the "payola" policy was aimed at preventing was "inducement." (Tr. 943) He explained: "We don't want valuable considerations to be in return for the broadcast of program matter." (Tr. 959-60) The payola affidavit, according to Wain, required employees to report any gift of substance or money, even if it was not an inducement to play records. (Tr. 961-62) Receipt of a valuable gift would be "fraught with impropriety" even if it were not an inducement, and he would have wanted to know about it. (Tr. 960-61) He acknowledged that the question of what constituted a gift of substance was for the subjective determination of the employee, and that employees were to use common sense in the area of payola. (Tr. 943-44, 958) They had been told not to accept any gift that was unreasonable. (Tr. 962)

333. Weiss, Metroplex's President, opined that the reporting standard for the payola affidavit was "common sense -- a dollar amount, applying the rule of reason, and what the purpose of the gift was, whether it was a singular gift or whether it was a promotional item or whatever it was." (Tr. 1381) A gift of substance was to be reported, according to Weiss, even if it was not an inducement. (Tr. 1375, 1376-77) He explained: "We would want it reported because we don't know if it's an inducement. So we would want to have it reported." (Tr. 1380)

### D. Role of Record Company Representatives

334. WHYI had ongoing business relationships with various record companies that produced and/or distributed the recordings of the artists whose music is broadcast over the station. (Metroplex Ex. 1, p. 80) These relationships were generally conducted with employees of record companies or independent agents who promoted the records of their company in WHYI's region. (Metroplex Ex. 1, ¶ 142; Tr. 721) The role of the record company representatives was to make the radio stations aware of his or her company's new releases and to get the station to listen to the new releases. This public relations activity entailed frequent contact between record company representatives and station personnel who were involved in the station's music selection process, normally the Program Director and the Music Director. Amadeo met with these record representatives on behalf of WHYI. (Metroplex Ex. 3, ¶ 11)

335. The major record companies in the industry employed or retained these representatives to work with the Florida radio stations. (Metroplex Ex. 3, ¶ 11) Every week between 75 and 100 newly-released records and/or albums containing multiple songs come into radio stations. With so many new records competing for their attention, radio

station Program Directors and Music Directors cannot listen to all of them to evaluate them for potential airplay. The job of the record company representative is to make radio stations aware of his or her company's new releases and get stations to listen to the records. This involves informing stations of newly-released records, making sure that station personnel are provided with promotional copies of each new record, talking to station personnel about the merits of such records, providing information about how the records are doing in other markets, and promoting the stations to listen to the records and consider giving them airplay. This public relations activity entailed frequent contact between record company representatives and station personnel who were involved in the station's music selection process, normally the Program Director and the Music Director. Telephone discussions were common. Record company representatives also visited stations fairly regularly to talk with station personnel. Occasionally discussions between them occurred at business lunches or dinners. (Metroplex Ex. 3, ¶ 11)

336. At WHYI, record company representatives worked primarily with the Music Director, Frank Amadeo, who was in contact with one or another record company representative every day. Such contacts between record company representatives and station personnel were a common and ordinary business practice in Florida. (Metroplex Ex. 3, ¶ 12; Tr. 661-62, 1652-53; *see also*, ruling at Tr. 1085-86)

337. It is appropriate to consider WHYI's position vis-a-vis the record industry. WHYI is a Parallel One radio station. These are a group of 25 to 27 stations in major markets that are among the most influential stations. (Tr. 716-17) Playlists of Parallel One stations are published in *Radio and Records*, which is an influential newspaper in the radio business. (Tr. 1660-61) In addition to the value of having a song played on a major market radio station, a record company would benefit substantially from the fact that a Parallel One station was carrying the song since that fact could be used to promote the song to other stations as worthy of play. (Tr. 1659-60)

338. Amadeo explained that record company representatives were often under strong pressure from their superiors to get records by new artists on WHYI's playlist. This pressure was removed if they got on the WHYI playlist. As noted, *supra*, WHYI was a Parallel One station with a "very strong reputation with other radio stations around the country." As a result, many stations viewed WHYI as a "gauge" for their own programming. (Tr. 1210-12) Independent record promoters were paid in part on the basis of records that they were promoting being added to the WHYI playlist. (Tr. 1204) Ross understood that some independent record promoters were paid based on the number of records they succeeded in having added to the playlist. (Tr. 729)

#### **E. Receipt by WHYI of Promotional or " Good Will" Items Distributed by Record Companies**

339. As detailed, *supra*, WHYI, as a popular music radio station, has had a continuing relationship with the various record companies that produce and/or distribute the recordings of the artists who perform the music played by WHYI. (Metroplex Ex. 1, ¶ 142) This relationship was with the record companies' representatives. (Metroplex Ex. 3, ¶ 12) It was the practice of record company representatives operating in the Florida radio markets to distribute promotional or good will items to the radio

stations or station employees with whom they had these relationships. (Metroplex Ex. 3, ¶ 13; Metroplex Ex. 2, ¶ 15; Tr. 931) Frank Amadeo, who worked from September 1984 to May 1985 as a record company representative for Elektra Records serving 35 radio stations in 13 markets throughout Florida, related that all record company representatives whom he knew, at that time, distributed such items, and all the radio stations with which he worked accepted such items both from him and from other record company representatives. (Metroplex Ex. 3, ¶¶ 3 and 13.)

340. These promotional or good will items, many of which advertised the name of a record artist, a record, or a record company, consisted of such items as plastic frisbees, beer can holders, windbreaker jackets, T-shirts, caps, coffee mugs, headbands, sun visors, paperweights, canvas tote bags, buttons, novelties, local concert tickets, and miscellaneous items. (Metroplex Ex. 1, ¶ 144 and atts. 53-72; Metroplex Ex. 3, ¶ 13) Other promotional or good will items received by WHYI employees were: a commemorative trinket distributed by Motown records marking Motown's 25th anniversary; a bottle of wine or champagne when WHYI achieved good ratings; and a fruit basket. (Metroplex Ex. 1, ¶ 145; Metroplex Ex. 3, ¶ 13) The Motown 25th anniversary pendant was given to radio station Program Directors throughout the country. (Tr. 797-98)

341. Ross estimated the value of most of these items at less than \$10. However, he estimated the value of concert tickets at \$20, windbreakers at \$50, and the Motown commemorative trinket, which was a gold or silver pendant to be worn on a necklace, at \$75. (Metroplex Ex. 1, pp. 81-83; Tr. 798)

342. The extent to which WHYI employees received items of this nature or other items is not established on the record since there was no station policy necessarily requiring disclosure of the receipt of such items.

343. Amadeo, recounting his experience as a record company representative in Florida, opined that the distribution of promotional and good will items constituted a public relations practice by which record company representatives attempted to draw attention to their product and to promote good working relationships with the people with whom they worked. (Metroplex Ex. 3, ¶ 14) In Ross' view, this was the same kind of promotional activity that WHYI itself undertook when it distributed similar promotional or good will items to its advertising agencies and clients. Ross understood the distribution of such items by record company representatives to have been a routine, common, and ordinary promotional practice in the industry. Ross considered this practice as acceptable; it would not induce anyone to play a record. (Metroplex Ex. 1, ¶¶ 142-46) Wain understood that it was a common industry practice, widely regarded as routine public relations, conferring no benefit or special or significant value upon the recipients. (Metroplex Ex. 2, ¶ 15)

344. Amadeo recounted that among the promotional or good will items that record company representatives provided to radio stations in Florida were complimentary tickets to local concert events at which an artist of the record company was appearing. (Metroplex Ex. 3, ¶ 15) A normal concert ticket had a face value of approximately \$20. A station might receive anywhere from two to ten such complimentary tickets to a concert. Usually such tickets were used by WHYI employees to attend the concert. However, depending on the concert and how many

tickets were received, WHYI occasionally gave away some of these tickets over the air to listeners as prizes. Sometimes the station had no use for such tickets and discarded them. (Metroplex Ex. 3, ¶ 15)

345. Amadeo explained that when a radio station gave concert tickets away to listeners over the air, publicity was generated for the concert at which the artist was appearing. This publicity arose simply from the disc jockeys' mention of the concert when the tickets were given away. WHYI did not specially "plug" the concert. According to Amadeo, even if a record company itself had no financial stake in the concert, it benefited indirectly from the public exposure of its artist at the concert. (Metroplex Ex. 3, ¶ 16) Amadeo attended about half of the local concerts for which he received complimentary tickets. He maintained that attendance at concerts by radio station Program Directors or Music Directors served the business purpose of enabling these programmers to see and hear performances of artists whose music they were regularly required in their jobs to evaluate. It also enabled them, in Amadeo's opinion, to assess public reaction and response to the artists, as demonstrated by the concert audiences. Amadeo felt that attendance at concerts helped radio station programmers to know their music and to know their market, both of which were essential to performing their jobs well. That is why Amadeo attended many of the concerts for which he received complimentary tickets. (Metroplex Ex. 3, ¶ 17)

346. As noted, *supra*, Amadeo received Christmas and birthday gifts from two personal friends of his who were record company representatives. These gifts had been in the nature of a shirt or bottle of cologne. (Tr. 1131) He had given Christmas and birthday gifts to them. He explained that they exchanged such gifts for several years, including when he was not employed at WHYI. (Metroplex Ex. 3, ¶ 19; Tr. 1131-32)

347. Amadeo knew of no instance where any other WHYI employee ever caused a record to be played on the station in return for something received from a record company or its representative. (Metroplex Ex. 3, ¶ 20) Both Amadeo and Walker averred that they never caused a record to be played on WHYI in return for receiving something from a record company or its representative. (Metroplex Ex. 3, ¶ 37; Tr. 4501) Ross and Wain also knew of no instance in which it ever happened at the station. (Metroplex Ex. 1, ¶ 171; Metroplex Ex. 2, ¶ 15)

348. Walker and Amadeo both did not consider the various promotional or public relations items they received to be anything of substance. (Tr. 1689-91; Metroplex Ex. 3, ¶ 81)

349. As a gesture of business good will, WHYI each year during the Christmas season spent about \$2,000 to host a formal party for all the local and national record company representatives with whom the station worked, and one year at Christmas the station gave each of them a bottle of wine. (Metroplex Ex. 1, ¶ 145; Metroplex Ex. 3, ¶ 14)

350. Metroplex's "payola" policy did not prohibit the station or its employees from accepting promotional or good will items. Both Ross and Wain expressed the belief that such items had no significant value, and did not constitute a potential to induce WHYI's music selection personnel to play records on the air. (Metroplex Ex. 1, ¶ 146; Metroplex Ex. 2, ¶ 15) Wain has always understood the purpose of such promotional activity to be simply to keep the promoter's product on people's minds; he has

never considered legitimate sales promotion of this kind to be improper. (Metroplex Ex. 2, ¶ 15) They both understand that the distribution of promotional and good will items was a routine and universal practice in the industry, and neither has ever heard any broadcaster suggest that the acceptance of such items amounted to "payola" or violated FCC sponsorship identification rules. For this reason, neither has ever thought that the practice involved any regulatory violation. (Metroplex Ex. 1, ¶¶ 146-47; Metroplex Ex. 2, ¶ 15)

#### F. WHYI's Request For Promotional Records and / or Cassette Tapes

351. As more fully detailed, *infra*, there are two circumstances in which WHYI received from record companies free promotional copies of record albums or cassette tapes: (1) WHYI automatically requested and received 50 promotional copies of each record it had added to its playlist; and (2) in connection with special WHYI giveaway promotions, the station received, on request, from 25 to 150 promotional copies of a popular artist's album. (Metroplex Ex. 1, ¶¶ 148-50; Metroplex Ex. 3, ¶¶ 21-22)

352. It was, and continues to be, WHYI's practice to request record companies to provide promotional copies of the record albums or cassette tapes containing the songs that WHYI had added to its playlist. A song was "added" on the week that it first went onto the station's playlist. While the number varied from week to week, WHYI averaged about three "adds" to its playlist per week. (Metroplex Ex. 1, ¶ 148; Tr. 1161)

353. The procedure for requesting these promotional copies was as follows. After WHYI had added a song to its playlist, a written request form was sent to the record company or its representative over Amadeo's signature requesting that WHYI be sent 50 copies of the album or cassette in question for use by the station as promotional giveaways. WHYI automatically submitted such requests for every song that it had added to its playlist. In response to these requests, record companies routinely furnished WHYI the requested number of promotional copies without charge. (Metroplex Ex. 1, ¶ 149 and att. 73; Metroplex Ex. 3, ¶ 21)

354. Most of the promotional copies received by WHYI through this procedure were used by the station for giveaway to station listeners on the air, to persons attending station promotional events, or to local charitable organizations for use in fundraisers. Some spare copies were used by WHYI employees for their personal collection. The copies retained by the station were for archival purposes. (Metroplex Ex. 1, ¶ 151) The station identified the artist and title of the record/cassette in on-air giveaways, although there was no "plug" or "sales pitch." (Metroplex Ex. 1, ¶ 151) The name of the record company would also occasionally be announced, when requested by the record company. (Tr. 808) The announcement of the artist and album title was the value sought by the record company. (Tr. 807)

355. Ross maintained that WHYI's decision to add a record to its playlist was not based, in any way, on the fact that the record company would later provide these 50 promotional copies to the station. Ross asserted that if a record company chose not to supply the promotional copies, WHYI would continue to play the record anyway based on its normal music selection criteria. In this con-

nection, Ross noted that often the record had been airing on WHYI for many weeks by the time the extra promotional copies were received. (Metroplex Ex. 1, ¶ 149)

356. On certain occasions, about 10 or 12 times a year, WHYI conducted special weekend giveaway promotions, such as a "Michael Jackson Weekend" promotion, in which it gave away to listeners over the air an album or cassette of a major star artist with a current hit on the charts. This was done where the artist already had a record on WHYI's playlist. The station never held such a promotion when the artist did not have a record on its playlist at the time. The record was played in its normal rotation. WHYI did not change the rotation during the album giveaway promotion and, according to Ross, there was no relationship between the giveaway and the rotation. (Metroplex Ex. 1, ¶ 150; Metroplex Ex. 3, ¶ 22; Tr. 849-53, 1143)

357. For these special promotions, WHYI usually received the promotional copies free of charge from the record companies. The quantity varied from 25 to 150, depending on the nature of the promotion and the number requested by WHYI. In cases where the record company was unwilling to furnish free promotional copies, WHYI bought its own copies for use in the promotion. The station never cancelled a prospective promotion because the record company failed to provide free copies. (Metroplex Ex. 1, ¶ 150; Metroplex Ex. 3, ¶ 22; Tr. 658-60, 806, 849, 1042) In some cases, record companies took the initiative in approaching WHYI and proposed that the station do a promotional giveaway of a particular artist's album to be supplied by the record company. In such cases, WHYI did the promotion only if it considered it good programming. The station sometimes rejected such proposals because they lacked programming merit. (Tr. 280-83) Ross believed that it was "okay" to request and accept records provided for these special promotional purposes and to give them away during broadcasts, to charities or whatever. (Tr. 803)

358. During the period September 1984 through May 1985, when Amadeo was a record company representative for Elektra Records, requests for free promotional giveaway copies of records were routinely made to him by every radio station for which he was responsible in his region of Florida. According to Amadeo, stations requested promotional copies of every record they had added to their playlist. The number of copies requested and provided generally depended on the size of the station's market. In a large market, the number was typically 50. In a small market, the number was typically 25 or fewer. Amadeo, when a Florida record representative, handled such requests for special station giveaway promotions from many radio stations. (Metroplex Ex. 3, ¶ 23; Tr. 1090)

359. Amadeo, based on his experience as a record company representative, expressed the belief that companies provide free promotional copies of albums or cassettes to radio stations for giveaways because giveaways over the air generate valuable publicity for the record and artist in question. He noted that the publicity comes from the mention on the air of the name of the artist and the title of the record being given away. (Metroplex Ex. 3, ¶ 24) Ross characterized this practice as very inexpensive advertising for the record company. (Tr. 282)

360. It was Ross' understanding that such distribution by record companies of free promotional albums to radio stations for giveaway over the air was a generally acceptable practice in the industry. (Tr. 284-85)

361. As noted in paragraph 354, *supra*, when giving away the promotional copies on the air, WHYI's disc jockeys identified the name of the artist and the title of the album or cassette. The disc jockeys did not make a "plug" or "sales pitch" for the album or cassette. (Metroplex Ex. 1, ¶ 151) The announcement was in the nature of, "You just won a Michael Jackson album." WHYI made the same kind of announcement whether the album was supplied free by the record company or was purchased by WHYI. (Tr. 807) If a record company providing free promotional copies requested that its name also be referred to in the announcement, as occasionally happened, WHYI always honored that request. (Tr. 807-08) It was Ross' understanding that all other major and minor CHR stations in the country follow the same practice with respect to broadcast announcements when giving away promotional copies of albums or cassettes on the air. He had never been advised that it violated the rules or was otherwise improper. (Tr. 289-90)

362. Amadeo, who served on the Music Committee, knew of no instance where WHYI added a record to its playlist in return for receiving promotional giveaway copies. (Metroplex Ex. 3, ¶ 25) Ross knew of no agreement or understanding with record companies that WHYI would broadcast any program matter (other than the mention referred to above) as consideration for receiving promotional copies. (Metroplex Ex. 1, ¶ 151; Tr. 283-84)

#### G. Theft of Promotional Records

363. Over a period of three to four months in 1986, Amadeo, without authorization, took approximately 250 to 300 promotional albums that WHYI had received free from record companies. He sold them for \$1 to \$2 apiece to a Massachusetts retail record store owner who had approached him for that purpose. (Tr. 1105-11) He received a total of \$500 to \$750. Nobody at WHYI knew about it at the time. (Tr. 1113) WHYI's management first learned of it through an internal investigation in mid-1987 during the discovery phase of this proceeding. (Tr. 666-69) Amadeo acknowledged what he had done after intense questioning. (Tr. 836) After learning of the matter, Ross, who had never heard of a retailer buying promotional albums for sale to the public, issued a written sanction to Amadeo; a 90-day probation during which Amadeo was subject to immediate termination for any further wrongdoing. (Tr. 835, 838, 1313-14) That sanction is part of Amadeo's personnel file. (Tr. 1314)

364. As a safeguard against unauthorized resale of promotional copies of albums or cassettes, record companies physically mark the albums or cassettes to identify them as promotional copies. An album is marked by slicing a corner of the album cover with a hand saw; a cassette is marked by drilling a hole into the plastic container in which the cassette rests. In addition, a gold or silver stamp is embossed into the album cover or the shrink wrap of the cassette cover. These markings are recognizable to those who are knowledgeable in the industry and identify the albums or cassettes as promotional copies. (Tr. 450-51, 612-14)

#### H. WHYI Promotional Concerts

365. WHYI periodically presented live music concerts featuring performances by recording artists or groups. (Metroplex Ex. 1, ¶ 153) The principal such concert was the annual WHYI Birthday Party concert held each summer in August at a location in the Ft. Lauderdale-Miami area. (Metroplex Ex. 1, ¶ 163; Metroplex Ex. 4, ¶ 3) The following artists appeared at the 1985 Birthday Party: Natalie Cole, Jermaine Stewart, Menudo, Kim Carnes, Shannon, Howard Hewett, Tom Boys and Bruce Johnston (as emcee). The following artists appeared at the 1986 Birthday Party concert: Miami Sound Machine, Jermaine Stewart, El Debarge, Expose, Nice & Wild and Sheena Easton (as emcee). (Metroplex Ex. 1, p. 94) This annual Birthday Party concert was presented free of charge to the public. (Metroplex Ex. 1, ¶ 163; Metroplex Ex. 4, ¶ 3) According to Ross, WHYI presented such concerts for two basic reasons. First, these concerts were a way to serve the community by giving the public an opportunity to see popular artists perform and by creating residual economic benefits to the community. Second, the concerts helped build and maintain WHYI's popularity with listeners. Ross explained that these concerts gave WHYI credibility as a market leader, which translated into increased listenership for WHYI. (Metroplex Ex. 1, ¶ 153)

366. WHYI received no admission proceeds from its promotional concerts. The station's practice was to engage artists for the concerts who would not charge WHYI a talent fee for their appearance. (Metroplex Ex. 1, ¶ 154; Metroplex Ex. 4, ¶ 5) It was Ross' view that the waiver of a talent fee by the artists was reasonable because the artist's appearance was quite different from a normal concert, which ordinarily required an enormous amount of time and effort on the part of the artist, including special rehearsals, costumes, and lighting. The artist's appearance at a WHYI concert was usually limited to performing two or three songs rather than a full concert presentation, and often the artist merely sang to "track" (*i.e.*, recorded back-up music) rather than to live accompaniment. (Metroplex Ex. 1, ¶ 154)

367. In about 90% of the cases, WHYI paid the artists' expenses, such as transportation and lodging, as well as fees for back-up musicians, if any, who supported an artist. (Metroplex Ex. 1, ¶ 154; Metroplex Ex. 4, ¶ 5; Tr. 1043, 1101) Some artists paid their own expenses because they were already in the area for some other reason or because they had their own expense budget for promotional concert appearances. (Metroplex Ex. 1, ¶ 154; Metroplex Ex. 4, ¶ 5; Tr. 1043, 1101-02)

368. Ross emphasized that an appearance at a WHYI concert generated publicity for an artist in the Ft. Lauderdale-Miami-Palm Beach market. He explained that such publicity came from the announcement of the event, the ongoing advance promotion of the event, and coverage of the event when it took place. On occasions there are newspaper stories and promotional advertisements, radio announcements, and in some cases, television news coverage of the event. The concert itself attracted large numbers of people, giving the artists live exposure to the public. Until the Birthday Party concert was moved to a smaller venue in 1986, it often drew more than 50,000 people. (Metroplex Ex. 1, ¶¶ 155, 163, and att. 74; Tr. 300-01)

369. Amadeo and Tony Novia, Promotions Director, had the principal responsibility for arranging the appearances of the artists at the WHYI promotional concerts. (Metroplex Ex. 3, ¶ 33; Metroplex Ex. 4, ¶ 4; Tr. 1028-30,

1753) To obtain artists for the annual Birthday Party concert, WHYI contacted all of the approximately 15 major record companies to inquire about the availability of their artists to appear at the concert. (Metroplex Ex. 65; Tr. 1039, 1307-10, 1754-57) Artists for the Birthday Concerts were obtained by sending letters to all record companies or their representatives soliciting them to provide acts. The letters asked the record companies to waive talent fees while indicating that WHYI would pay out-of-pocket expenses. (Tr. 1039, 1207, 1307; Metroplex Ex. 65) At the outset of discussions with artists or their managers, Amadeo informed them that WHYI did not pay talent fees to artists for appearing at its concerts. (Metroplex Ex. 3, ¶ 33; Metroplex Ex. 65, p. 2) Some artists whom WHYI invited declined to appear without a talent fee. (Metroplex Ex. 4, ¶ 6) Most, however, were willing to appear without a talent fee. (Metroplex Ex. 3, ¶ 33; Metroplex Ex. 4, ¶ 6)

370. Based on discussions and negotiations with many artists and their managers, it was the understanding of Amadeo and Novia that the reason artists agreed to appear at WHYI concerts without a talent fee was because they wanted the publicity and exposure that WHYI's concerts gave them, with the attendant opportunity to increase their record sales. (Metroplex Ex. 3, ¶¶ 34, 36; Metroplex Ex. 4, ¶ 6) Some artists asked WHYI if they could appear at the Birthday Party concert even though WHYI had not made the request. (Metroplex Ex. 1, ¶ 154; Metroplex Ex. 3, ¶ 35; Metroplex Ex. 4, ¶ 6) Another consideration expressed by artists in some instances was the additional exposure received at ancillary local promotions, such as autograph signings, arranged by WHYI as part of the agreement. (Metroplex Ex. 4, ¶ 7)

371. No claim is made by Ross or Amadeo that they believed that the practice of having record artists waive their talent fee for appearances at promotional concerts was common or widespread in the broadcast industry.

372. Ross acknowledged that one of WHYI's music selection criteria was the forthcoming appearance of an artist at a WHYI concert. Although WHYI received no gate receipts from its concerts, the station had a strong interest in promoting the success of its concerts by playing records of artists who would be appearing at the concerts. This, according to WHYI, increased public awareness of and enthusiasm for the concerts, and enhanced the concert audiences' enjoyment of the concerts by increasing listeners' familiarity with the artists' songs. In some cases, the artists appearing at a concert had current hit records that WHYI was playing. When that was the case, the airplay given to such records constituted the airplay from their normal rotation. (Tr. 970-71) Several of the artists appearing at the concerts had no current hit record at the time. In such cases, the station played "oldies" or "recurrents" of the artist (*i.e.*, distant or recent past hit records). (Metroplex Ex. 1, ¶ 162, atts. 79-82, 88; Metroplex Ex. 3, ¶ 32; Tr. 970-71) "Oldies" and "recurrents" were not listed on the station's weekly playlist; the playlist included only the current releases being played on the station. Such oldies and recurrents were not promoted by record companies, either for radio airplay or for record store sales. (Metroplex Ex. 3, ¶ 32; Joint Ex. 2, ¶ 3)

373. Amadeo related that in his discussions and negotiations with artists and their managers for WHYI concert appearances, there had never been any agreement, or suggestion, that WHYI was obliged to play the artist's

records in return for the artist's waiving a talent fee. (Metroplex Ex. 3, ¶ 36) Novia, who was also involved in negotiations with artists, maintained that there was never any discussion of airplay to be given on WHYI for the artist's records; no manager had ever conditioned an artist's appearance at a concert on WHYI's playing the artist's record, or indicated that the artist would appear without a fee because they knew or understood that WHYI would play the artist's record. (Metroplex Ex. 4, ¶ 8; Tr. 1029) In no case, Novia asserted, had there been any agreement or understanding on WHYI's part that WHYI would play the artist's records in return for the artist's agreeing to appear at the concert without a talent fee. (Metroplex Ex. 4, ¶ 6)

374. Novia was not a member of WHYI's Music Committee and had played no role in decisions concerning record rotation or additions to the station's playlist. (Metroplex Ex. 4, ¶ 9) Walker, who as Program Director chaired the Music Committee, did not participate in making arrangements with artists for WHYI concert appearances. (Tr. 1748-49, 1753) Only Amadeo, as Music Director, participated both in negotiating with artists and in the music selection decision-making process. During his tenure as Music Director, he participated in virtually all of the Music Committee's discussions and decisions about music selection. (Metroplex Ex. 3, ¶ 37) However, Amadeo claimed that when WHYI played the record of an artist appearing at a WHYI concert, the fact that the artist was appearing without a talent fee was "absolutely not a consideration" in playing the record. (Metroplex Ex. 3, ¶ 36) He stressed that, to his knowledge, in no case was airplay given to a record because WHYI had some agreement or understanding with the artist that airplay would be given in return for the artist's appearance at a WHYI concert. (Metroplex Ex. 3, ¶ 37)

375. A comparison of WHYI's playlists with national data in *Radio & Records* as to records of the artists who appeared at WHYI's 1985 and 1986 Birthday Party concerts, does not disclose that those artists received disproportionate airplay of their records during the period immediately before and after these concerts. (Metroplex Ex. 1, ¶ 163 and atts. 75-88) In all cases, where WHYI played current records of those artists around the time of the concert, those records (1) were ranked on national Top 30 or Top 40 charts (atts. 75, 76, 83, 84, 85), (2) were receiving play on a significant number of other reporting stations, even though not ranked on a national Top 30 or Top 40 chart (atts. 77, 86), and/or (3) achieved the level of popular appeal in WHYI's market that was reflected in its numerical ranking on WHYI's Top 30 or Top 40 playlist. (atts. 76, 77, 78, 83, 84, 85, 87) It is recognized that these analyses included only the record of the artists who appeared at the concerts and not all records of the record company which arranged for the appearance at the concerts.

#### I. The 1986 Grammy Awards

376. One of the record companies with which WHYI had regular contact in the course of its business was Scotti Brothers, a diversified entertainment company which produces films and television programs, manages recording artists, produces records on its own label, and has served as an independent record promoter for other record companies, promoting their records for airplay on radio stations. (Metroplex Ex. 1, ¶ 166; Tr. 725, 731, 1198, 1248, 1615-16) For a period of time in 1985 and 1986, Scotti

Brothers, in addition to promoting records on its own label, was promoting non-Scotti records to WHYI as an independent promoter. (Tr. 1199-1200)

377. Scotti Brothers' record representative for WHYI's region was Rita Fuki (Fuki). (Metroplex Ex. 1, ¶ 26; Tr. 1248) Fuki promoted Scotti Brothers label records to WHYI and, in that connection, Amadeo normally spoke to her on the telephone once or twice a week. (Tr. 1248-50a) Around late January 1986, in the course of one of their conversations, Fuki asked Amadeo whether he and Walker, then WHYI's Program Director, would be interested in attending the Grammy Awards ceremony in Los Angeles. (Metroplex Ex. 3, ¶ 26; Tr. 1249) The Grammy Awards are an annual music industry ceremony sponsored by the National Academy of Recording Arts & Sciences (NARAS), a nonprofit organization whose membership includes record company executives and recording artists. The awards recognize various categories of outstanding achievement by artists, songwriters, and others in the industry. (Metroplex Ex. 1, ¶ 164; Metroplex Ex. 89; Tr. 1237)

378. Amadeo recounted the following scenario concerning this incident: after talking to Walker and Ross about it, Amadeo told Fuki that they would be interested; she told him that the admission tickets to the ceremony would be provided by Scotti Brothers, but that Walker and Amadeo would be responsible for their travel and hotel expenses; Fuki offered to have Amadeo and Walker's airline and hotel bookings made by Scotti Brothers' regular travel agency in Los Angeles because, she said, the travel agency was able to get good discounts on such arrangements; the airline tickets were to be mailed to Amadeo and Walker and Scotti Brothers was to invoice Amadeo and Walker for the tickets after it received its bill from the travel agency. (Metroplex Ex. 3, ¶ 26)

379. Walker and Amadeo informed Ross that they were planning to go to the Grammy Awards at Scotti Brothers' invitation. Ross approved, stressing that they would have to pay their own expenses for the trip because it was against station policy for employees to take trips at record company expense. (Metroplex Ex. 1, ¶ 166; Metroplex Ex. 3, ¶ 27; Tr. 755, 1128, 1760) Both Walker and Amadeo assured Ross that they understood they would have to pay their own expenses and promised they would do so. (Metroplex Ex. 1, ¶ 166; Metroplex Ex. 3, ¶ 27) Pursuant to Ross' directive, their time in Los Angeles was also charged as annual vacation time. (Metroplex Ex. 1, ¶ 166, atts. 89 and 90; Metroplex Ex. 3, ¶ 27) Ross did not know nor did he inquire of Amadeo or Walker as to the cost of the tickets. (Tr. 750-52)

380. Walker and Amadeo each received two admission tickets to the Grammy Awards ceremony, which was held on February 25, 1986. Each took a guest. Amadeo's guest was Margaret Ann Ronayne, who was a record representative for Motown Records and a personal friend of Amadeo's. Walker's guest was Stacy Marks (Marks), an employee of a Miami television station. (Tr. 1243-45, 1611-12) The tickets covered admission to the awards ceremony and to a post-ceremony celebration, which Amadeo attended. (Metroplex Ex. 3, att. 5; Tr. 1241-42) Walker did not remember whether or not he attended the post-ceremony celebration. (Tr. 1610-11)

381. The Grammy tickets had no admission price shown on them. However, the record establishes that Scotti Brothers paid NARAS \$350 apiece for the four tickets given to Walker and Amadeo. (Metroplex Ex. 89)

Amadeo "assumed" that a Grammy ticket was about the same as a concert ticket, about \$20. (Metroplex Ex. 3, ¶ 30 and att. 51) He believed that they were promotional items comparable to the concert tickets that record company representatives distribute "all the time." (Tr. 1257) When he learned a few months before the hearing that Grammy Awards tickets cost between \$150 and \$500, he was astounded. (Metroplex Ex. 3, ¶ 30)

382. Walker had a similar understanding as to the cost of the tickets. His impression at the time of the invitation was that a Grammy Awards ticket was like a concert ticket, with an approximate value of \$20 or \$30. (Tr. 1627, 1733-34)

383. Both Ross and Wain maintained that they did not realize at the time that the Grammy Awards tickets had any significant value. Before the issue arose in this proceeding, Ross was unaware that there was any cost for such a ticket. It was his understanding that admission was by invitation only and was not open to the general public. (Metroplex Ex. 1, ¶ 168) Wain, with whom Ross discussed the Grammy Awards trip before Walker and Amadeo went to Los Angeles, did not inquire as to their value. (Tr. 755-56) He explained that he thought, at the time, that the tickets "were the kind of tickets that people ordinarily receive at industry and trade conventions or seminars." (Tr. 753-54) He was "under the impression that the tickets were free, that they were invitational tickets." (Tr. 991, 988-91, 997) When Wain learned the value of the tickets, he was of the view that their receipt was "highly improper" and constituted a "gift of substance." (Tr. 989)

384. Walker, Amadeo and their guests, went to Los Angeles on February 21 and returned on February 26, 1986. (Metroplex Ex. 3, ¶ 28) While there they attended the Grammy Awards ceremony on February 25. When they checked out of their hotel, the Westin Century Plaza, Walker paid their hotel bill with his credit card. (Metroplex Ex. 3, ¶ 28 and att. 2) The charge reflected on the credit card slip for the two rooms (Nos. 552 and 554) was \$825.27, plus \$1.00 miscellaneous, a total of \$826.27. (Metroplex Ex. 3, att. 2, p. 1) The backup itemization furnished by the hotel at checkout likewise came to \$825.27. However, unlike the credit card slip, the itemization purported to relate only to one of the rooms (No. 552). (*Id.* pp. 2-10) It was the understanding of both Amadeo and Walker that the \$826.27 charge was the total for both rooms. (Tr. 1264, 1642) Walker explained that when they checked out, he asked the hotel desk for the final bill for the two rooms.<sup>21</sup> (Tr. 1642) Amadeo claimed that he reimbursed Walker in cash for his share sometime "fairly soon" after they returned from Los Angeles. (Metroplex Ex. 3, ¶ 28; Tr. 1268-69, 1647) Walker's recollection of the details was hazy. He recalled that Amadeo reimbursed him at least partially for something. (Tr. 1643-44, 1647-48)

385. On March 10, 1986, about two weeks after Walker and Amadeo returned from Los Angeles, Scotti Brothers sent Amadeo an invoice for the airplane tickets that Scotti Brothers had arranged for them. The total amount invoiced was \$398, representing two \$199 round trip tickets between Ft. Lauderdale and Los Angeles. (Metroplex Ex. 3, ¶ 29 and att. 3) Because this was a personal expense, the invoice went to Amadeo directly and did not go through WHYI's bookkeeping and accounting system. (Metroplex Ex. 3, ¶ 29)

386. Amadeo failed to pay the invoice when he received it. He claimed that he put the invoice with the hotel bill and then overlooked it when he filed them away at home after reimbursing Walker for his share of the hotel bill. (Tr. 1273-75) He did not receive a reminder notice or another follow-up bill from Scotti Brothers, and nobody at Scotti Brothers told him that the bill was unpaid. (Metroplex Ex. 3, ¶ 29; Tr. 1276-77) Walker never received an invoice from Scotti Brothers. (Tr. 1630-31) He thought Amadeo had mentioned to him that he had received the invoice. (Tr. 1631) He claimed that he had been under the impression that he had paid it. (Tr. 1631) However, in searching their records after the 1986 Grammy Awards incident became an issue in this proceeding, both Walker and Amadeo discovered that they had not paid the airfare invoice. (Metroplex Ex. 3, ¶ 29; Tr. 1273, 1631)

387. Ross made no effort to determine whether Walker and Amadeo had paid for their airline tickets until the question was raised in this proceeding. He explained that nothing had led him to believe that Walker and Amadeo had not fully paid the expenses of their 1986 Grammy Awards trip, as they had assured him they would. (Metroplex Ex. 1, ¶ 167; Tr. 776) When the question arose, Ross inquired of Amadeo as to this matter. He also contacted Tad Dowd of Scotti Brothers and asked him whether there was an invoice and, if so, whether it had been paid. Dowd told Ross that he would look into it and get back to him. In the meantime, Amadeo brought his records to Ross, informing him that he had given some cash to Walker and that he thought the airfare bill had not been paid but that he was not sure. Ross learned from Dowd that the invoice had not been paid. Ross asked Dowd how Scotti Brothers could have failed to follow up on the invoice, and Dowd explained that the company had been in the process of converting to a computer system at the time and that the matter had somehow fallen through the cracks. (Tr. 773-75, 777)

388. Ross instructed Amadeo to pay his share of the invoice. (Metroplex Ex. 1, ¶ 167; Tr. 773, 1271) Amadeo did so on June 9, 1987. (Metroplex Ex. 2, ¶ 29 and att. 4; Tr. 1283, 1792-93) Walker, who was no longer employed at WHYI, paid his share in June 1987. (Tr. 1630-31) Although Ross did not issue a written sanction to Amadeo for having failed to pay the airfare invoice, he gave him an oral reprimand. (Tr. 779, 784, 794-95)

389. The WHYI playlists for the period 1985 and 1986 reveal that 17 of approximately 300 records added to the station's playlist were Scotti Brothers records on the Scotti Brothers/CBS label. A comparison of the status of those records on WHYI's weekly playlists, with the airplay the records were receiving nationally, as reflected in the national weekly charts published in *Radio & Records*, fails to establish any apparent excessive or unwarranted play of the Scotti Brothers records over WHYI. (Metroplex Ex. 1, ¶¶ 169-170) This is also true for the period following receipt of the Grammy tickets by Amadeo and Walker. (Metroplex Ex. 1, att. 97, 100-105)

390. In one instance, in September 1985, WHYI added a Scotti Brothers record that received no reported airplay by other stations. WHYI dropped that record after two weeks of limited play. (Metroplex Ex. 1, att. 96) In every other case, the Scotti Brothers records played by WHYI in 1985 and 1986: (1) were ranked on national Top 30 or Top 40 charts. (Metroplex Ex. 1, atts. 91-93, 97-98, 100-01, 105-07), (2) received play on a significant number

of other reporting stations, even though not ranked on a national Top 30 or Top 40 chart (Metroplex Ex. 1, atts. 94-95, 99, 102-03), and/or (3) achieved sufficient popular appeal in WHYI's market to warrant being ranked in WHYI's Top 30 or Top 40. (Metroplex Ex. 1, atts. 91-94, 97-98, 100-01, 103-06) No more favorable treatment was given to Scotti Brothers records added after late January 1986, when the Grammy Awards invitation was extended (Metroplex Ex. 1, atts. 102-08) than to Scotti Brothers records added before then. (Metroplex Ex. 1, atts. 91-107) Over the two-year period WHYI gave no airplay to seven Scotti Brothers records that were reported as receiving play on other stations (Metroplex Ex. 1, atts. 108-114), two of which received national chart rankings. (Metroplex Ex. 1, atts. 109-114).

#### J. Paper Adds

391. As noted, *supra*, the weekly playlists of WHYI and other radio stations were published in *Radio & Records*, a national music and broadcast industry trade publication. WHYI's playlist identified the records currently being played by the station, excluding "oldies," "recurrents," and test records. It ranked the Top 30 or Top 40 such records in numerical order based on their relative popularity in WHYI's market, listed additional records that were receiving limited airplay in a category designated "On", and also listed the records that WHYI had added to the playlist for the first time that week in a category designated "Adds." (Joint Ex. 2; Metroplex Ex. 75, pp. i-ii)

392. Wain, Ross, Weiss, and Walker understood a paper add to be a situation where a radio station submitted a playlist to the trade press listing a record that the station had not actually played. (Tr. 706-07, 1002, 1656-57, 1337) Amadeo, however, defined a paper add as the inclusion of the station's published playlist of a record that the station, although giving it some experimental airplay during overnight hours, was not playing in a regular or normal rotation throughout the day.<sup>22</sup> (Tr. 1146, 1151, 1156-57)

393. Amadeo, as Music Director, was responsible for compiling WHYI's playlist after the weekly Music Committee meeting and reporting it to *Radio & Records*. (Tr. 1682) He stressed that in no instance did he ever include on the playlist a record that was not being played on the station. (Tr. 1177) However, he acknowledged that on some occasions, between January 1983 and June 1984, WHYI's playlist listed records that were not then being played in a regular rotation. (Tr. 1285-98) The records were "test records, *i.e.*, new and unfamiliar records that WHYI played on a limited experimental basis during the overnight period (10:00 p.m. to 5:00 a.m.) to determine through audience reaction whether the record was likely to become popular. (Tr. 1148-50, 1157) Usually test records were records by new artists. (Tr. 1163, 1287) A record was played on a test basis only if the Music Committee felt that, although it was new and unestablished, it had programming merit under the station's criteria and the potential to become a hit. (Tr. 1157-60, 1296) The only criterion that was not involved with regard to a test record was the call-out research, since a record could not be tested on call-out until it had some exposure. (Tr. 1296) Typically a test record was played once a night for three to four weeks. (Tr. 1160, 1167) Listener reaction was assessed through the station's request-line calls and local retail sales. (Tr. 1160) Based on the strength of listener response, the record was either dropped or upgraded into a regular rotation. (Tr. 1162) Under normal

procedure, a test record was not listed on WHYI's playlist while it was in test status. (Tr. 1294-95) However, if it was subsequently upgraded to a regular rotation, it was added to the playlist at that time. (Tr. 1162, 1294-95)

394. Amadeo disclosed that, contrary to the normal procedure, the WHYI playlist submitted to *Radio & Records* occasionally included a record that was only in test status at the time and was not being played in a regular daytime rotation. In these cases, the record was classified on the playlist as an "add." (Tr. 1158) Amadeo referred to these as paper adds. (Tr. 1290-91) This occurred between January 1983 and June 1984. (Tr. 1202, 1291) During that period WHYI tested approximately 180 records. (Tr. 1291) Of that number, Amadeo's best estimate was that about 10 were reported on the playlist as "adds" while they were in test status, although he conceded it could have been as many as 15. (Tr. 1190, 1292) Amadeo explained that the decision to do this as a favor to the record company representatives, who were under pressure from their superiors to get the records added to stations' playlists, was made by Walker and himself. (Tr. 1175, 1179-80, 1193-94, 1210-11, 1217-18, 1220) According to Amadeo, the favor was listing the record on the playlist as an add and not in playing the record as a test record. The decision to play the record as a test record, Amadeo explained, was based solely on the Music Committee's judgment that the record had programming value and merited testing, and that decision was reviewed with the station's independent programming consultant before the record was put on the air in a test rotation. (Tr. 1210, 1292-93, 1297) Amadeo, who emphasized that WHYI never put a record on the air due to pressure, explained that the favor, the response to the pressure from the record representative, was in agreeing to report the record to *Radio & Records* as an "add" to the playlist while it was only in test status. (Tr. 1180-81, 1175, 1210, 1218, 1292-94) Amadeo further explained that, although the record would have been put on the air as a test record whether or not there was pressure from the record company representative, it would not have been listed as an add to the playlist at that point absent such pressure. (Tr. 1297)

395. Amadeo explained his motivation by saying, "it's human nature to want to help people you work with." (Tr. 1195) According to him, there was no pattern by which a particular record company representative was helped by paper adds; it was done on an individual basis, and Amadeo believed that all the record representatives were helped, at one time or another. (Tr. 1209) According to Amadeo, both Scotti Brothers and Motown Record benefited from the practice. (Tr. 1204-06) Although he recognized that it was a bad business practice and that it was misleading because it misrepresented the station's rotation, he believed that it did not hurt anybody. He did not understand it to be illegal or an FCC violation. (Tr. 1172-73, 1218) He maintained that he never had an agreement or understanding with any record company representative that he would get something in return for adding a test record to the playlist. (Tr. 1318) The practice stopped at WHYI after Amadeo attended a broadcast music industry convention in June 1984 at which paper adds were a major subject of discussion and came under criticism by industry members. (Tr. 1176-78, 1203, 1212, 1291)

396. After returning from the convention, and reading some additional articles, Amadeo discussed his observations with Walker and they decided that the practice of "paper adds" should cease. (Tr. 1178, 1203, 1212) Prior to the time he left the station in August 1984, the practice had ceased. (Tr. 1178) Amadeo did not believe that "paper adds" were illegal or against FCC rulings or were covered by the payola affidavit. He believed them to be just a bad business practice. (Tr. 1173, 1175, 1220)

397. Walker's testimony was somewhat contradictory. He defined a "paper add" as "a situation where a radio station reported to the various trade publications that a record had been added to the playlist when, in fact, it was not being played on the air." (Tr. 1656-57) Based on his definition, he stated that no "paper adds" occurred while he was at the station. (Tr. 1657) In his view, if a record was played even once or twice and reported on *Radio & Records*, it would not be "paper add." (Tr. 1663) Walker was not involved in the preparation of the playlist and he did not review it. (Tr. 1681-83)

398. Amadeo did not believe Ross was aware of the practice of paper adds. (Tr. 1196-97) In a discussion in August 1984, shortly before Amadeo left WHYI to work for Elektra Records, Ross asked Amadeo if there had been anything unusual recently concerning adds to the station's playlist, to which Amadeo responded that he thought there had been a paper add. (Metroplex Ex. 1, att. 50; Tr. 717-19, 1225-31) Ross claimed that he then queried the station's independent programming consultant, Dwight Douglas, who assured him that he had reviewed the playlists and was confident there had not been any paper adds. (Metroplex Ex. 1, att. 50; Tr. 719-20, 799, 801) Ross also questioned Walker, who assured him that there had been no paper adds. (Tr. 719, 801, 1765-66)

399. Wain related that he had a "frank discussion" with Ross that it was not in their interest to have paper adds and Ross agreed with him, assuring him that he would make sure that it did not occur. (Tr. 1006)

400. When the subject of paper adds came up in the trade press, Wain sent a memorandum to Metroplex managers on April 8, 1985, that stated in part (Southeast Ex. 11, p. 1):

Frankly, a paper ad [sic] is a fraud. It is a representation to our public and the people who we deal with, *i.e.* suppliers, distributors, record producers, artists, record companies, etc., that we are either playing a record or considering playing a record. That is not the purpose of a published playlist. The purpose of a published playlist is simply to represent to our various publics that these are the records we are actually playing.

Therefore, I want you to make certain that no radio station in the Metroplex Group is ever guilty of "paper ads." If a record appears on our playlist, it should represent the fact that the record is being played.

#### K. Drug Use By WHYI Employees

401. The record evidence with respect to the use of drugs by WHYI employees and whether such drugs were, on occasion, furnished to employees by record company representatives rests upon the testimony of Robert Walker, WHYI Program Director, from January 1983 to July 1986. During his initial appearance as a witness, Walker

invoked his privilege against self-incrimination as to whether he participated in drug use with record company representatives and whether he received drugs from such representatives. The Presiding Judge, by *Order* (FCC 87M-3318), released December 22, 1987, granted the "Immunity Request" filed December 12, 1987, of Southeast and ruled that Walker should be given limited immunity to testify concerning the receipt by him of drugs from record company representatives. The Presiding Judge's *Order* and the Immunity Request were forwarded to the General Counsel, who forwarded the matter to the U.S. Attorney General, William F. Weld, then Assistant Attorney General, Criminal Division of the U.S. Department of Justice, by letter dated January 28, 1988, approved the immunity request. (Tr. 4404-06) As a result, Walker appeared and testified on March 2, 1988, under a grant of immunity from prosecution. The Presiding Judge carefully observed Walker during his testimony on that date, and concludes that while he was truthful, he was vague and evasive and equivocal in his responses to questions. The Presiding Judge realizes that it was difficult for Walker to reveal in a public forum what had been a debilitating drug problem and even more difficult to identify those individuals with whom he engaged in this perfidious and life-destroying habit. However, the Presiding Judge left the courtroom at the conclusion of Walker's testimony with the strong feeling that the entire story with respect to this sad incident had not been told.

402. One other matter merits discussion. Both Walker and counsel made continued reference to "recreational drug use" in describing the use of cocaine and marijuana, both during the hearing and in their proposed findings. The accepted definition of recreation is any form of play, amusement or relaxation used for the purpose of refreshment of mind or body. The Presiding Judge rejects the concept that the use of cocaine or marijuana, both debilitating drugs, refreshes the mind or body. For this reason, reference will be made to "drug use."

403. Walker, who was WHYI Program Director from 1983 to June 1986, acknowledged that from the late 1970's until 1986 he had a debilitating alcohol and drug problem. (Tr. 4412-13) He testified that he no longer uses drugs and regrets ever having done so. He explained the use of drugs was part of his lifestyle at the time and was accepted among the people he knew in the media and entertainment business, who also used drugs. (Tr. 4412-13, 4425, 4431, 4442, 4483-84) The circle of friends with whom he socialized included media, record company personnel and other people, almost all of whom used drugs. (Tr. 4414, 4442) He characterized drug use as "pervasive" in the radio business in the Miami-Ft. Lauderdale area. (Tr. 4435)

404. Walker estimated that on perhaps 20-50 occasions "out of hundreds," record company representative were among the persons present at social functions he attended where drug use took place and where he participated in drug use. (Tr. 4409-11, 4432) These functions typically were parties, concert outings, or club gatherings. (Tr. 4431-32) Walker stressed that these were not organized drug parties, but just social gatherings of people who knew one another. (Tr. 4422)

405. Walker claimed that he usually brought drugs to such functions. (Tr. 4438) In those settings, whoever had drugs shared them with those present. (Tr. 4487) Consequently, he made his drugs available to others and they shared their drugs with him. (Tr. 4486-87, 4495-96) Walk-

er described the party scene as follows: "There might be three or four people passing something around. There might be six people passing something." (Tr. 4483) In some cases record company representatives were among those sharing their drugs, and in such cases Walker partook of the drugs provided by those people. (Tr. 4438-39) According to Walker, he did not draw a distinction between record company representatives and the others present. (Tr. 4439, 4442) He maintained that the only drugs he was ever provided by record company representatives were those provided during these functions, and he emphasized that he never received from these representatives more drugs than he used there and then. (Tr. 4486, 4493-94) He denied that he was ever given drugs to be taken off the premises for future use or distribution. (Tr. 4438-39, 4486, 4493-94)

406. Walker explained that on no occasion did he have the impression that a record company representative was trying to induce him to put a record on the air in return for providing drugs. (Tr. 4496) He claimed that the drug scene was part of his and the others' lifestyle and that there was no explicit or implicit understanding of a quid pro quo. (Tr. 4487-88) He denied that the music selection decisions he made as Program Director of WHYI were ever influenced by the fact that he shared drugs with record company representatives on these "social occasions." According to Walker, it never caused him to play a record on the station or to place a record in an abnormally high rotation. (Tr. 4501)

407. Walker identified representatives of several record companies who did business with WHYI and with whom he had done drugs, although, in most instances, he could not remember whether they had supplied the drugs. Record company representatives with whom Walker socialized included Jordan Zucker (A&M Records), Steve Jones (Atlantic), Rich Tartanico (CBS), Jeff Shane (Epic), Ed. Nuhfer (Warner Brothers), Margaret Ann Ronayne (Motown), Dave Prescott (Artista), George Luthin (Polygram), and Shirley Torlucci (RCA). (Tr. 4418-19) He did not socialize with anybody from Scotti Brothers. (Tr. 4419) While unable to recollect specific instances, Walker said that over time he participated in "social" drug use several times with most of these people. (Tr. 4459-67, 4477-80) In all cases it was in a group setting, and Walker did not know in how many, if any, such instances the record company representative provided the drugs. He did recall that Ronayne, of Motown records, who was a close friend, did so on about half the occasions they used drugs together. (Tr. 4461, 4462, 4464, 4465, 4466, 4467 4474-75, 4478, 4479, 4480)

408. Walker did not remember specifically whether the record company representatives had given him drugs since drug use occurred in social situations where someone would come up and give him drugs, but he could not recall specific facts as to who gave what to whom. (Tr. 4414, 4420-21, 4431-36)

409. Walker related that other WHYI employees were present at gatherings where record company representatives were present and where drug use took place. Amadeo was present on roughly half the occasions when Walker did drugs with Ann Ronayne. (Tr. 4474) Amadeo was also present at many functions where drug use took place involving other representatives identified by Walker. However, Walker could not state with certainty whether Amadeo engaged in drug use with any of the representatives. He believed it likely that he did, since he had

engaged in drug use with Amadeo and had observed Amadeo use drugs. (Tr. 4427, 4429, 4469) Walker recalled that Sonny Fox was present at functions involving drug use where record company personnel were present. While Walker did not know whether Fox engaged in drug use at these functions, he had personally done drugs with Fox on occasion. (Tr. 4429, 4482) Walker's best recollection was that other WHYI disc jockeys including Al Chio, Ron Hersey and "Cathy" attended some of these functions, although he did not know whether they participated in the drug use. (Tr. 4485-86) He had engaged in drug use with Chio, Hersey and "Kathy Crews."<sup>23</sup> (Tr. 4429) While he had no recollection as to whether specific individuals engaged in drug use at the "social" functions, it was his perception that everyone who attended them generally was doing drugs in the same manner as he was. (Tr. 4483-84)

410. As noted, *supra*, the drugs that Walker used were marijuana and cocaine. (Tr. 4457) His usage of drugs occurred at night, after work. (Tr. 4455) While not sure, he did not think he ever used drugs at WHYI's studios; he maintained that he was never under the influence of drugs while on the job. (Tr. 4424, 4455-56)

411. As an example of his drug use, Walker said he might smoke one, four, or six joints of marijuana over five to six hours, or use a quarter of a gram to a gram of cocaine. (Tr. 4457-58) A gram of cocaine cost \$60 to \$70 at that time, and an ounce of marijuana (which yielded about 30 joints) cost \$30 to \$50. (Tr. 4458) Walker used, at most, two or three grams of cocaine a week for short periods, costing about \$200 a week. (Tr. 4490) Walker's annual salary at WHYI was about \$78,000 when he began as Program Director and about \$90,000 when he left, in addition to which he was paid bonuses. (Tr. 4491, 4499) In August 1986, Walker stopped using drugs and alcohol after a warning by Ross that his job was in jeopardy for having missed work. (Tr. 4445-58, 4452-53, 4503)

412. Although Walker had discussions with Ross about his absenteeism problem, he did not recall whether they had ever discussed his drug use. (Tr. 4446-48, 4451-52) To Walker's knowledge, the matter of his using drugs provided at social functions by record company representatives did not come up in their discussions. (Tr. 4499)

413. As noted in paragraph 313, *supra*, Ross made clear that he questioned Walker in August 1984, March 1986, and again in June 1987, whether he had participated in drug use with record company representatives and employees and that Walker, on all three occasions, vehemently denied that he had. (Tr. 682-84, 686-91) Amadeo, in March 1986, had similarly denied to Ross that he had been involved in drug use with record company representatives or employees. (Tr. 691) Amadeo, in his testimony in this proceeding, denied having participated in drug use with any record company representative or employee, including his friend Ann Ronayne. He also denied observing Walker participating in any drug use with record company representatives or employees. (Tr. 1279-80)

414. As noted in paragraph 406, *supra*, Walker denied that he ever caused a record to be played or to be played in an abnormally high rotation, or was influenced in his role as Program Director by the fact that he received drugs from record company representatives. (Tr. 4501) He maintained that he never favored or gave preferential treatment in his capacity as Program Director to any record company promoter or independent contractor who

provided him with drugs. (Tr. 4493) According to Walker, he made a very clear distinction between his personal problems and what he had to do at work. He stressed that he never compromised the product at the station for any reason. (Tr. 4493)

415. Walker did not consider his drug use with record company representatives in connection with his execution of WHYI's "payola" affidavits. He did not consider that he was receiving a reportable gift when cocaine was given to him by record company representatives at social gatherings. (Tr. 4489)

### ULTIMATE FINDINGS AND CONCLUSIONS

1. Metroplex Communications, Inc. (Metroplex), seeks a grant of its application for renewal of the license of FM Station WHYI, Ft. Lauderdale, Florida. Southeast Florida Broadcasting Limited Partnership (Southeast) has filed a mutually exclusive construction permit application for the Station WHYI facility. As a result, a choice must be made between these two applicants. However, before addressing the comparative choice to be made, it must be determined whether Metroplex, during the period February 1, 1982, to date, violated Section 317 of the Communications Act of 1934, as amended, and/or Section 73.1212 of the Commission's Rules, 47 C.F.R. 73.1212, in the operation of Station WHYI and, if so, the effect on Metroplex's basic qualifications to be a Commission licensee. Additionally, it must be determined whether Southeast is financially qualified to construct and operate its proposed facility, and whether Southeast's certification as to its financial qualifications was false, and the impact on Southeast's basic qualifications to be a Commission licensee. The Commission has made clear, and the courts have affirmed, the principle that only basically qualified applicants are entitled to Commission consideration. *Louis Adelman*, 28 FCC 432 (1960); *aff'd sub nom Guinan v. Federal Communications Commission*, 111 U.S. App. D.C. 371, 297 F.2d 782 (1961); *Empire Communications Company*, 47 FCC 2d 329, 331 (1974). Therefore, it is both necessary and appropriate to first resolve the issues as to the basic qualifications of both applicants before undertaking the comparative evaluation.

#### *The Metroplex Section 317 Issue*

2. The Presiding Judge, by *Memorandum Opinion and Order* (FCC 87M-810), released July 31, 1987, as subsequently modified by *Memorandum Opinion and Order* (FCC 87M-2111), released September 8, 1987, designated an issue to determine whether Metroplex, in the operation of Station WHYI, during the period February 1, 1982, to date, failed to comply with the sponsorship identification requirements of Section 317 of the Act, as amended, and 47 C.F.R. 73.1212.<sup>24</sup>

3. Section 317 of the Act, as amended, reads, in pertinent part, as follows:

Section 317(a)(1) All matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person:

provided, that "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(b) In any case where a report has been made to a radio station, as required by Section 507 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

The reference in Section 317(b) to "a report" made to a radio station, "as required by Section 507 of this Act," is to the following requirement set forth in Section 507(a):

Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service, or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement of such station.

4. The cited statutory provisions impose three basic obligations on a Commission licensee: (1) to make a sponsorship identification announcement when matter is broadcast in return for any money, service or other valuable consideration received by the licensee (Section 317(a)(1)); (2) to make a sponsorship identification announcement when an employee reports to the licensee that matter is to be broadcast in return for valuable consideration received by such employee (Sections 317(b) and 507), and (3) to exercise "reasonable diligence" to ascertain from its employees information to enable it to make the required sponsorship announcement (Section 317(c)).

5. Both Metroplex and the Mass Media Bureau take the position that there must be an agreement or clear understanding that the reason that the broadcast of the program material occurred was because of the receipt of "valuable consideration" by the licensee or its employees. However, both Metroplex and Southeast acknowledge that the agreement needed to trigger Section 317 may be implied rather than express and, importantly, that an implied agreement may be found where the particular facts and circumstances warrant drawing an inference of program-related consideration having passed to the licensee or its employees. Metroplex and Southeast are also in agreement that a licensee could be found to have satisfied the "reasonable diligence" requirement of Section 317(c) of the Act, as amended, notwithstanding evidence that an employee en-

gaged in payola. Further, the Presiding Judge agrees with Metroplex that there can be no basis for holding that a licensee violated Section 317(c) where the evidence mandates a ruling that no payola occurred.

6. As noted, *supra*, Section 317(a) requires that sponsorship identification announcements be made when the licensee itself, as opposed to its employees, receives valuable consideration for broadcasting a particular matter. It is appropriate to consider the three instances in which Metroplex received something from record companies, promoters or recording artists; namely, (1) the receipt by WHYI of promotional and goodwill items; (2) the appearance of recording artists at WHYI concerts without a talent fee; (3) the receipt, after a request by WHYI, of records and/or cassette tapes.

7. The record establishes (paras. 339-350) that Metroplex, from time to time, received promotional or goodwill items from record companies or their representatives. The Presiding Judge agrees with Metroplex and the Bureau that no significant benefit was conferred on Metroplex or its employees, since these items were of nominal value and would not give rise to the need for sponsorship identification. *Kaye Smith Enterprises*, 71 FCC 2d 1402, 1408 (1979). There is no record evidence that the routine acceptance by Metroplex and its employees of promotional and goodwill items furnished by record companies influenced the music selection decisions of WHYI employees responsible for such selection.

8. The record also establishes (paras. 365-375) that, as a matter of general practice, Metroplex solicited the appearance of recording artists or groups without the payment of a talent fee. Metroplex sent letters to the record companies or their representatives soliciting them to provide artists and to waive talent fees. These concerts, however, were free concerts and Metroplex did not financially benefit from them, although it did receive favorable publicity in the community. The record establishes that the only airplay given the records of such artists was the normal airplay of the current record of the artist on the playlist in the station's regular rotation or the broadcast of "oldies" or "recurrents" of the recording artists who had no current hits. It is ruled that the playing of these "oldies" or "recurrents" did not result in any significant benefit to the artists or record companies in terms of record sales or exposure, since these records were not promoted by the record companies for sale in record stores and were not listed on WHYI's playlist. Additionally, the record does not support a finding that there was an implied agreement that WHYI would give airplay in return for the artists' appearance at these concerts. The record establishes (para. 370) that some artists asked WHYI if they could appear at the Birthday Party Concert even though WHYI had not made the request. It is apparent that artists valued the exposure these concerts gave them and were willing to perform without a talent fee.<sup>25</sup> More importantly, there is no evidence that the broadcast of these artists' records on WHYI was inconsistent with the station's established criteria for the selection of records to be broadcast.

9. The findings (paras. 351-362) establish that WHYI requested record companies to provide copies of the record albums or cassette tapes of the songs that WHYI had added to its playlist. WHYI had a standard practice whereby, after it had added a song to its playlist, a written request form was sent to the record company or its representative, requesting that WHYI be sent 50 copies of the

album or tape. Additionally, WHYI conducted special weekend giveaway promotions, at which time it gave away to listeners on the air an album or tape of the featured artist who had a current hit on WHYI's playlist. On these occasions, WHYI requested of the record company or its representative anywhere from 25 to 150 copies of the album or tape be furnished to it. There is nothing in the record establishing that there was any airplay of the artist or the record beyond what was already being done in its normal rotation on the WHYI playlist.

10. Both Metroplex and the Bureau espouse the position that, in those instances where the records provided by the record companies were used by WHYI as prizes given away on the air, such a practice did not require sponsorship identification announcements. The Presiding Judge recognizes that the Bureau is charged with seeing to it that there is compliance with the sponsorship identification requirements of Section 317, and he accepts the opinion of the Bureau that the announcement of the name of the artist and the title of the record over the air at the time of the award of the prize falls within the proviso of Section 317(a) of the Act, as amended. It is ruled that, to the extent that the albums or tapes furnished WHYI by record companies were utilized by it for use as prize giveaways on the air, such practice came within the cited proviso of Section 317(a) of the Act, which exempts these recordings from the requirement of sponsorship identification announcements. The proviso, cited *supra*, qualifies the general rule that a sponsorship identification announcement is required when a station broadcasts matter in return for money, services, or other valuable consideration.

11. However, the findings (para. 354) establish that while most of the copies received by WHYI from the record companies were used for giveaway to listeners on the air, some were distributed to persons attending station promotional events or to local charitable organizations for use in fundraising. Equally important, some copies were used by WHYI employees for their personal collection. The Bureau is silent as to whether its conclusion that sponsorship identification announcements were not required is applicable with respect to those albums or tapes not given away as on the air prizes. The Presiding Judge is not persuaded by Metroplex's argument that those copies not used for on the air prizes "are superfluous" and, therefore, not within the scope of the sponsorship identification requirements.

12. The *House Report on 1960 Amendments*<sup>26</sup> set forth a number of examples to illustrate the intended effect of the proviso clause of Section 317(a)(1), cited *supra*. Example (1) reads:

A record distributor furnishes copies of records to a broadcast station or a disc jockey for broadcast purposes. No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes. Thus, should the record supplier furnish 50 or 100 copies of the same release, with an agreement by the station, express or implied, that the record will be used on a broadcast, an announcement would be required because consideration beyond the matter used on the broadcast was received.

This example makes clear, in the Presiding Judge's view, that broadcasters should limit their receipt of free records from record companies to those needed for "broadcast purposes." While accepting the Bureau's position that the use of such records or tapes for on the air giveaways is consistent with Example (1), the Presiding Judge is not persuaded that the same conclusion can be reached with respect to WHYI's use of these records for purposes other than as on the air giveaways.

13. Example (7) in the *House Report* reads as follows:

A perfume manufacturer gives five dozen bottles to the producer of a giveaway show, some of which are to be identified and awarded to winners on the show, the remainder to be retained by the producer. An announcement is required since those bottles of perfume retained by the producer constitute payment for the identification.

This example makes clear that a sponsorship identification announcement is required when a broadcaster is furnished quantities of an item of which some are "to be identified and awarded to winners" on the air and the remainder of the items "to be retained" by the broadcaster. The Commission, in its Public Notice re *Applicability of Sponsorship Identification*, cited, *supra*, emphasized in note 1 that the same principles apply to records as to "other property or service" furnished to a broadcaster. Contrary to Metroplex's contention, it is ruled that the records retained by WHYI and used for purposes other than on the air giveaways, constituted "payment for the identification" and an appropriate sponsorship announcement was required.

14. The Presiding Judge does not agree with the Bureau and Metroplex that the consideration (the 50 records) necessary to trigger a sponsorship identification announcement must be offered to the broadcaster *before* the record is placed on the WHYI playlist and initially broadcast. The WHYI practice of formally requesting 50 copies of the record was so well established over a long period of time that it was a *modus operandi*, known and accepted by the record industry. Stated simply, the record industry was well aware that they would be expected to provide the requested 50 recordings and there was a well established understanding that they would comply.

15. Admittedly, there appears to be no precedent with respect to this particular fact situation. In view of the fact that this is a novel question, a conclusion that WHYI wilfully and/or knowingly violated the sponsorship identification requirements of Section 317 of the Act is not warranted. However, the Presiding Judge is constrained to express his serious reservations as to the appropriateness of the practice followed by WHYI in requesting 50 copies of the albums and tapes from the record companies and utilizing some of these records for purposes other than on the air giveaways. Hopefully, the Commission, in reviewing this case, will give broadcasters and subordinate Commission authority further guidance on this matter.

16. As noted in paragraph 4, *supra*, Sections 317(b) and 507 of the Act impose the obligation upon a Commission licensee to make a sponsorship identification announcement when an employee reports to the licensee that matter is to be broadcast in return for valuable consideration

received by such employee. The findings establish that no such report was ever submitted by any WHYI employee to Metroplex management. As noted, *supra*, Section 317(c) of the Act, requires a Commission licensee to exercise "reasonable diligence" to ascertain from its employees information to enable it to make the required sponsorship identification. The Presiding Judge rejects the contention of Southeast that Metroplex should be held to the "special diligence" and "extraordinary measures" standard rather than the "reasonable diligence" standard. The Commission has made clear that it sees no reason to believe that the "reasonable diligence" standard is ineffectual and this standard will be held applicable in this case.<sup>27</sup> *Plugola Policy*, 76 FCC 2d 221, at 223 (1980); *Unnecessary Broadcast Regulation*, 57 RR 2d 913, at 918 (1985).

17. Before addressing the specific incidents which give rise to the question whether any WHYI employees received "valuable consideration" for the broadcast of any matter over WHYI, it is appropriate to consider and resolve whether Metroplex, as the licensee of WHYI, exercised the requisite "reasonable diligence" in overseeing its employees' activities. The "reasonable diligence" requirement of Section 317(c) is a preventive measure to ensure that Commission licensees make diligent efforts to have appropriate procedures for obtaining information from their employees to enable the licensee to comply with the sponsorship identification requirements of the Act. The measures undertaken by Metroplex are detailed in the findings (paras. 288-327). It is found that Metroplex did have such policies and practices in effect and that they were communicated to its employees.

18. The findings establish a history of licensee concern with measures to control and avoid the possibility of payola at station WHYI. These policies and procedures were operative during the relevant time period, namely, February 1, 1982, to the time of this proceeding. The procedures utilized by the licensee to inform employees of the station's policy against payola included the periodic submission of "payola affidavits" by employees; the circulation of an "Employee Handbook" which dealt with this subject, and other memoranda dealing with the problem of payola. Additionally, in 1979, 1986 and 1987, Metroplex's management distributed the NAB memorandum which deals with payola to WHYI's air staff. Also, during the pertinent time period, Ross, WHYI's General Manager, had discussions with station personnel during which he emphasized his concern that there be compliance with the sponsorship identification requirements and expressed his serious concern that payola was to be avoided at all cost. As detailed in paragraphs 315-327, Metroplex established a music selection process and retained a program consultant in an effort to prevent outside influences from affecting the selection of the records broadcast on WHYI.<sup>28</sup>

19. The findings demonstrate that WHYI management continually sought to educate and sensitize its employees as to the impropriety of payola by communicating the licensee's concern about payola and cautioning employees that they were not to play records in return for consideration received from record companies or promoters. The Presiding Judge rejects Southeast's claim that the efforts of Metroplex reflect no more than a "token effort" to ensure compliance with Section 317 of the Act. It is concluded that Metroplex communicated its policy to its employees and established a regular reporting system to safeguard against payola. It is ruled that, while the execution of

these policies and procedures were not without flaws, Metroplex demonstrated "reasonable diligence" to ensure that nothing was broadcast on WHYI in return for undisclosed consideration to employees from record companies.

20. Directing attention to the specific incidents concerning which evidence was adduced with respect to the receipt by employees of consideration from record companies, it has already been concluded in paragraph 7, *supra*, that no significant benefit was conferred on WHYI employees by their receipt of promotional or goodwill items, and that there is no record evidence that the routine acceptance of such items influenced the music selection decisions of WHYI employees. It is further ruled that these goodwill items did not constitute "valuable consideration" and no sponsorship identification announcement was required. *Kaye Smith, supra*, at 1408.

21. As set forth in the findings (paras. 376-390), Robert Walker and Frank Amadeo, WHYI's Program Director and Music Director, respectively, were each offered two tickets to the 1986 Grammy Awards ceremony in Los Angeles by a representative of Scotti Brothers, a record promoter. Walker and Amadeo requested and received authority from Ross, WHYI's General Manager, to accept the tickets provided they pay their own transportation and hotel expenses in connection with the event. Neither Ross, Walker, or Amadeo were aware that Scotti Brothers had paid \$350 each for the four tickets. Walker and Amadeo had assumed that the tickets were the equivalent of concert tickets, with a value of \$20 or \$30, and Ross, who understood that admission was by invitation only, was unaware that the tickets involved any cost to the recipients. Scotti Brothers arranged the transportation for Walker and Amadeo and their two guests, and billed Amadeo for the \$398 cost representing two \$199 roundtrip tickets. The Presiding Judge agrees with Southeast that it is likely that neither Walker or Amadeo would ever have paid for these tickets had the matter not been raised during this proceeding. Nevertheless, their failure to have done so timely cannot be attributed to the licensee, since Ross had emphasized to them that they were to defray their own expenses in attending the Grammy Awards ceremony. The Presiding Judge agrees with Metroplex that there was no reason why Ross would have either assumed or suspected that Walker and Amadeo had failed to reimburse Scotti Brothers for their airplane tickets; particularly since they had assured Ross that they would pay their own expenses for the trip.

22. Both Walker and Amadeo denied that the receipt of the Grammy Awards tickets influenced their decisions relative to music selections on WHYI. More importantly, the evidence does not disclose any excessive or unwarranted play of Scotti Brother's records during the pertinent time period. It is ruled that the licensee exercised "reasonable diligence" in connection with this incident, and that no adverse ruling is warranted with respect to this matter.

23. The drug use by WHYI employees is chronicled in the findings (paras. 401-415). Walker, during the time he was WHYI's Program Director, had a drug and alcohol dependency problem. He attended numerous parties with record company representatives and promoters and on those occasions, engaged in drug use with those individuals. The Presiding Judge is not persuaded by the arguments of Metroplex and the Bureau that Walker's acceptance of drugs from promoters "in this social con-

text" precludes finding that "payola" was involved. The *Kaye Smith* case, cited *supra*, is not controlling as to this particular fact situation. The unpleasant fact is that Walker, because of his drug dependency, was the ready recipient of drugs from record promoters who, understandably, were anxious to ingratiate themselves with him. That Walker was unwilling or unable to recognize this fact does not lessen the seriousness of the situation. However, the record does not support the holding, urged by Southeast, that Ross, the General Manager, knew of Walker's drug problem or that he was aware that Walker was the recipient of drugs from record promoters. Ross acknowledged that he was aware that Walker had a drinking problem and had, in fact, discussed his drinking and absenteeism with him. However, on those occasions (paras. 313-314), when Ross questioned Walker, he vigorously denied that he was doing drugs with record company promoters. A licensee is not the guarantor as to its employees' behavior during nonworking hours; rather, its duty is to exercise "reasonable diligence" to safeguard against payola. The Presiding Judge, who carefully observed Ross while testifying, is convinced that he was truthful in his testimony and reasonably diligent in his efforts to safeguard against payola. Walker lied to Ross when questioned about his relationship with record promoters. Amadeo, the Program Director, also misled Ross when he denied any involvement in drug use with record promoters. It is ruled that the licensee was reasonably diligent in its efforts to safeguard against this pernicious form of payola.

24. The Presiding Judge recognizes that Walker and Amadeo effectively controlled WHYI's Music Committee and, thus, the selection of music broadcast on WHYI. However, there is no evidence that there was any other than normal airplay of the records on WHYI's playlist or that any records were placed on the playlist contrary to the established criteria for the selection of records.

25. The weekly playlists of WHYI, and other radio stations, were published in *Radio & Records*, a trade publication. The practice of "paper adds," as described by Amadeo (paras. 393-398), involved reporting to the trade press that WHYI was playing certain records when such records were not part of WHYI's regular rotation. Sections 317 and 507 prescribe the *playing* of records on the air for undisclosed consideration. The Presiding Judge agrees with Metroplex and the Bureau that, while "paper adds" are an improper business practice, this practice does not constitute a violation of Sections 317 or 507 of the Act and does not adversely impact on Metroplex's qualifications to be a broadcast licensee. It is also ruled that Amadeo's unauthorized sale of records from WHYI's supply represents employee misbehavior and does not reflect on Metroplex's qualifications to continue as the licensee of Station WHYI. It is concluded, for the reasons articulated, *supra*, that the Section 317 issue is resolved in Metroplex's favor.

#### *Southeast Financial Certification Issue*

26. The Presiding Judge enlarged the issues to determine the facts and circumstances surrounding the certification of Southeast's financial qualifications and whether such certification was false (*Memorandum Opinion and Order*, FCC 87M-1287, released June 4, 1987). The findings (paras. 190-227) detail that Gloria Butler (Butler), Southeast's General Partner, certified that Southeast had sufficient net liquid assets on hand or available

from committed sources to construct and operate the proposed facility for three months without revenue. Butler relied upon cost estimates prepared by Southeast's communications counsel and its engineering consultant. Counsel was the sole source of the estimated operating costs and the engineering consultant was solely responsible for the estimated equipment and installation costs (paras. 193-215). The record is silent as to the basis for the estimated operating costs, since Butler had no idea what such basis was and counsel, the author of these estimates, did not testify in this proceeding. Southeast argues that these initial operating cost estimates were not "patently unreasonable," and that it was not unreasonable for Butler to rely upon counsel for such estimates. However, the record discloses that the operating costs were seriously underestimated, and that Butler, who had no experience or knowledge concerning the operation of a broadcast facility, had no basis, in fact, to conclude that counsel was qualified to make such estimates or that such estimates were reasonable. Certainly, nothing in Butler's background or experience qualified her for the task of estimating operating expenses. Additionally, she undertook no inquiry, investigation, or research with regard to these estimates to place herself in a position to ascertain whether they were reasonable or not. Her acceptance of the estimates of operating costs prepared by her communications counsel represented a leap of faith, rather than a reasoned evaluation or decision. Certainly when an applicant is required to explain the basis for such estimates, it should, at a minimum, meet its burden of making the author of the estimates available for questioning.

27. Southeast, in its Reply Findings (paras. 19-22), attempts to distance itself from the revised operating estimates which are now part of its proposal, and which were prepared and offered by its "expert." This attempt at abandoning its present financial proposal is categorically rejected as improper and inappropriate.

28. There is no basis whatsoever shown in this record for the \$12,500 cost estimate for site rental. Butler was aware that WHYI was, for the reasons detailed in the findings (para. 207), operating from two sites, namely, the candelabra tower and the Gannett tower. She had been informed by the Southeast engineering consultant that no antenna costs had been included to replicate the Gannett antenna because such cost was "prohibitive." While the Presiding Judge accepts Southeast's position that it only intended to operate from one of these two sites, it was incumbent upon the applicant to have appropriately ascertained the cost for such operation. The record establishes that operation from the Gannett site would result in an additional cost in excess of \$166,000. Southeast, in revising its estimated costs, has adopted this cost as its own. It is ruled that Southeast's failure to have made any effort to ascertain the antenna cost involved in operating from the Gannett site represents an abdication of its duty to exercise reasonable and/or prudent judgment.

29. Both Metroplex and the Bureau contend that the initial cost estimates were fundamentally flawed by the failure to include the \$500,000 bonus to Cohen & Berfield. Southeast, in its reply, argues that the written terms of the retainer agreement are consistent with the understanding of Southeast's principals that the bonus would not come due until after the first three months of operation. While the Presiding Judge agrees with Southeast's basic position that the \$500,000 bonus to counsel

need not have been included as a cost of construction and/or operation, since such payment is not due within the three month period, he is not persuaded by the *post litem* arguments set forth in paragraphs 24-27 of its Reply Findings. Stated simply, the Presiding Judge accepts the position espoused by the principals of Southeast that it was always their understanding that this generous bonus was not to be due and payable until at least three months after commencement of station operation. In reaching this conclusion, the Presiding Judge expresses an awareness of the realities of the situation; namely, that if Southeast was the successful applicant that it would be the holder of a permit valued in the millions of dollars and would have little difficulty obtaining the necessary financing to meet this obligation. Additionally, it is recognized that communications counsel, who was the major architect of the Southeast proposal, could not be expected to demand payment of the bonus if it would jeopardize Southeast's ability to operate the broadcast facility.

30. The Presiding Judge rejects the contention of Metroplex that the CMNY loan commitment, which was initially for \$600,000, represented an "accommodation." Metroplex's citation of this Presiding Judge's ruling in the *KFRC* proceeding (*RKO General, Inc.*; Partial Initial Decision, FCC86D-49, released August 8, 1986) is distinguishable; there it was ruled that the bank had no intention of making such a loan. In the instant case CMNY, the lender, has an ownership interest in the applicant, and the facts do not warrant concluding that the loan was not made in good faith. Significantly, however, the loan provided that the collateral for such loan would be "all the tangible assets of the partnership and personal guarantee and pledge of assets of each of the principals as deemed necessary by CMNY." Other than Perry's expression to Butler of his willingness to guarantee the loan, Butler had no assurances from any of the other principals that they were prepared to meet these stringent collateral requirements. If the purpose of limited partnership is to limit the liability of its limited partners, any requirement that they, in effect, pledge their life and property in connection with such an endeavor should be explicitly evidenced in writing. Southeast's limited partners have maintained throughout this proceeding that they chose Butler as Southeast's only General Partner because of her business experience and acumen. Butler's failure to have sought and received evidence that the other limited partners were willing to place all of their personal assets at risk, does not represent the actions of an experienced business person. Butler should, if she did not, have realized that CMNY had the option to require that all the principals of Southeast agree to the collateral requirements and, that, unless they were willing to do so, the loan would not be forthcoming. It is ruled that it was not reasonable for Butler, in certifying that Southeast was financially qualified, to have relied on the loan for financing Southeast's proposal.

31. At the time Butler executed the application and represented that Southeast had sufficient net liquid assets to construct and operate the station, the limited partners had advanced only \$50,000 of the \$200,000 commitment they had made to finance the prosecution of Southeast's proposal. It is ruled that Butler's reliance upon counsel's assurance that the limited partners were capable of meeting their commitments of \$150,000 cannot be construed as "reasonable." It was obligatory that she determine the financial capabilities of the limited partners to meet their

obligation.<sup>29</sup> The Commission, in the past, has approved financial plans and financial qualifications based in part upon the payment of legal fees on a current basis. *Muncie Broadcasting Company*, 54 RR 2d 42, 46-47 (1983). In the Presiding Judge's view, when an applicant is certifying to its financial qualifications, the individual so certifying must have made reasonable efforts to determine that the principals of the applicant have the financial wherewithal to meet their future obligations to make their payment of "legal fees on a current basis." Butler had no knowledge as to the assets or liabilities of the limited partners and such knowledge was a prerequisite to any determination and representation as to their liquid assets. The fact that these limited partners later made the requisite contributions when called upon to do so does not resolve the question in Southeast's favor. It was incumbent upon Butler to have acquired the necessary information as to the liquidity of the limited partners' assets prior to making the representation to the Commission.

32. Both the Commission and the courts have emphasized over the years that this agency's scheme of regulation is premised on the Commission's ability to depend upon the accuracy and truthfulness of the representations of its prospective licensees. The Court of Appeals has stated that this Commission must rely heavily upon the completeness and accuracy of the submissions made to it and that applicants have an affirmative duty to inform the Commission of the facts the Commission needs to know in order to fulfill its statutory mandate. *RKO General, Inc. v. F. C. C.*, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). The Commission, in noting that lack of candor involves concealment, evasion and other failures to be fully informative, has been emphatic that lack of candor represents deceit. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (1983).

33. It is ruled that Butler acted irresponsibly in certifying as to Southeast's financial qualifications; that such action represents a gross and callous disregard for the Commission's requirements, and evidences a lack of candor, standing as the basis for disqualification. However, the Review Board recently, in *Northampton Media Associates*, 3 FCC Rcd 5164 (1988), ruled that the test with respect to financial certification is whether the applicant "made *deliberate misrepresentations* regarding its financial qualifications in executing its financial certification."<sup>30</sup> While Butler's actions with respect to certification can appropriately be characterized as cavalier, if not totally irresponsible, the Presiding Judge feels constrained to rule, as did the Review Board in *Northampton Media Associates*, that the "blunderbust of disqualification" is not warranted. For this reason, the financial certification issue is resolved in Southeast's favor.

#### *Southeast's Financial Qualifications Issue*

34. As noted, *supra*, Southeast revised its estimated operating costs and its equipment and installation costs, so that the total estimated cost of construction and operation is \$828,050. To meet these estimated costs, Southeast relies upon a loan commitment letter from CMNY for \$900,000. The Presiding Judge rejects Metroplex's contention that Southeast's revised cost estimates do not reflect "a consistent, considered and substantiated picture of construction and operating costs . . ." that it must meet. While Southeast's expert witness proffered with respect to operating costs, admittedly overlooked a few minor cost

items, the cushion of \$71,950 is adequate to cover these costs. The Bureau's claim that Southeast failed to include the cost of operating from both the Gannett and candelabra sites is rejected. Southeast has made clear that its proposal is for operation from one site and it has provided adequate cost estimates to cover operating costs for either the Gannett or candelabra site.

35. Metroplex's attack on the \$900,000 loan commitment from CMNY is rejected. The loan letter spells out the "essential details" as to the terms of the loan, including the length of the loan, the interest rate, a moratorium on principal and interest for the first three months, collateral requirements, and the statement of intent by CMNY to make such loan. It is ruled, contrary to Metroplex's contentions, that the loan commitment provides "reasonable assurance" of the availability of the necessary funds to construct the station. *Multi - State Communications, Inc. v. F. C. C.*, 590 F.2d 1117, 44 RR 2d 487 (D.C. Cir. 1978); *Las Vegas Valley Broadcasting Co. v. F. C. C.*, 589 F.2d 594, 44 RR 2d 683. In the *Las Vegas Valley* case, the court made clear that the "reasonable assurance standard" as to the standard for loan commitments is particularly important in a renewal comparative hearing in order to avoid "a pro-incumbent bias" in favor of the renewal applicant. The attack by Metroplex on CMNY's ability to make such loan is also rejected. CMNY is a small business investment company (SBIC) licensed pursuant to federal statute to make such loans. The Commission has recognized SBICs as financial institutions which are not required to establish their ability to make a proposed loan. *Washington Christian Television Outreach*, Mimeo No. BC 002820, released August 19, 1981. In conclusion, it is ruled that Southeast has shown that it has reasonable assurance of the availability of sufficient funds to meet its estimated cost of construction and operation of its proposed facility.<sup>31</sup>

#### *The Comparative Issue*

36. Having found that both Metroplex and Southeast possess the requisite qualifications to be a broadcast licensee, it is appropriate to determine which of these mutually exclusive proposals would, on a comparative basis, better serve the public interest. This comparative evaluation, of necessity, involves a choice between a renewal applicant, Metroplex, the licensee of WHYI, which has been operating the facility, and a permit applicant, Southeast, which seeks the opportunity to operate the facility in the future. The Communications Act of 1934, as amended, and court precedent, require that a full comparative evaluation be made with respect to these mutually exclusive applicants. *Ashbacker Radio Corp. v. F. C. C.*, 326 U.S. 327 (1945); *Citizens Communications v. F. C. C.*, 145 U.S. App. D.C. 32, 447 F.2d 1201 (1971), clarification granted, 149 U.S. App. D.C. 419, 463 F.2d 822 (1972).

#### *(a) WHYI Renewal Expectancy*

37. It is well established that if a broadcast renewal applicant has provided "meritorious" or "substantial" service to the public, it is entitled to a legitimate renewal expectancy and, as a result of such an award, can reasonably be confident of renewal of its licensee. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom Central Florida Enterprises, Inc. v. F. C. C.*, 683 F.2d 503 (D.C.

Cir. 1982); *Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom Victor Broadcasting, Inc. v. F. C. C.*, 722 F.2d 756 (D.C. Cir. 1983).

38. The Commission has recognized that focusing on the program evaluation of a renewal applicant's past performance in the comparative renewal process has disadvantages in that such qualitative evaluation is an inherently subjective process. However, such evaluation is presently the test applicable for determining whether the existing renewal applicant is entitled to a renewal expectancy and such an evaluation is set forth, *infra*. In determining whether a broadcast licensee has provided substantial service to its listening public, it is appropriate to determine whether the licensee ascertained the community needs and problems and whether its programming was responsive to those needs and problems. Such an evaluation should also give serious weight to any showing of public support for, or objections to, the station's performance during the pertinent time period and also any record of violation of the Commission's rules or policies. *Pillar of Fire*, 99 FCC 2d 1256, 1259-1276 (Rev. Bd. 1984), review denied, 2 FCC Rcd 519 (1987); *United Broadcasting Company, Inc.*, 100 FCC 1574, 1581 (1985).

39. Before considering WHYI's record of performance during the pertinent time period, namely, December 20, 1985, to December 20, 1986, it is appropriate to review the legal standards for judging a renewal applicant's past broadcast record. *Cowles Broadcasting and WABZ*, cited *supra*; *Broadcast Communications, Inc.*, 93 FCC 2d 1162 (Rev. Bd. 1983), modified 97 FCC 2d 61 (1984), *aff'd by judgment sub nom Genesis Broadcasting, Inc. v. F. C. C.*, No. 84-1154 (D.C. Cir., filed March 29, 1985); and *Kaye - Smith Enterprises*, 98 FCC 675, recon. denied 98 FCC 2d 670 (Rev. Bd. 1984), rev. denied FCC 85-192, released April 19, 1985, *aff'd by judgment sub nom Hoffart Broadcasting v. F. C. C.*, D.C. Cir. No. 85-1266, decided April 16, 1986. The cited cases establish that a substantial record, sound, favorable and substantially above a level of mediocre service, gives rise to a renewal expectancy which, in turn, warrants a comparative preference.

40. Both the Commission and the courts have indicated a disinclination to gauge, to any controlling degree, a station's responsiveness by a quantitative standard; for as articulated, *supra*, the principal test of a licensee's entitlement to renewal expectancy rests upon its diligent and continuing efforts to discover and fulfill the needs and problems of its community. *WPIX, Inc.*, 68 FCC 2d 381, 400 (1978). The Review Board has stressed that the proper focus in evaluating an incumbent licensee's record in a comparative renewal case is a qualitative one. *Intercontinental Radio, Inc.*, 98 FCC 2d 608 (Rev. Bd. 1984), modified 100 FCC 2d 817 (1985).<sup>32</sup> The cited Commission and court precedent mandate a review of the record as to "objective or concrete evidence" that WHYI has searched out and attempted to serve through its programming the community needs and problems. *Video 44*, 3 FCC Rcd 3587, 3591 (Rev. Bd. 1988).

41. It is ruled, for the reasons set forth, *infra*, that the record in this proceeding warrants concluding that the past performance of Station WHYI during the pertinent time period has been substantial. The Presiding Judge agrees with the Bureau that the findings (paras. 14-19) demonstrate that WHYI participated in appropriate ascertainment efforts during the renewal period. WHYI participated in formal group community leader ascertainment interviews and also engaged in informal

ascertainment efforts through the community involvement of its employees, and, additionally, was made aware of community problems and needs through on-air interaction with the station's listeners during discussions of community issues. It is found that WHYI conscientiously undertook to identify the needs and problems of its community and the area it served.

42. The findings (paras. 20-87) establish that WHYI was actively involved in the promotion of charitable and community service activities, providing both on-air and on-site support to numerous charitable and public service organizations. It both broadcast public service announcements for such organizations and provided station personnel and equipment to promote worthwhile community efforts. WHYI utilized its radio facilities to mobilize community support for numerous charitable causes and civic activities. WHYI evidenced a commitment and dedication to involvement in its community. Southeast attempts to denigrate these community efforts by arguing that they were a "carefully orchestrated aspect" of WHYI's station promotion, and had as their main purpose achieving name recognition both for WHYI and its on-air staff. Certainly, WHYI was not adverse to promoting the station and its call letters, but this is not inconsistent with its effective efforts to serve numerous community programs and activities and does not detract from those efforts.

43. The Presiding Judge also agrees with the Bureau that WHYI programmed to meet ascertained needs through "regularly scheduled locally produced weekly public affairs programs." WHYI, through such programs as "Y's Rap," which featured interviews with guests on a wide range of topics, responded to ascertained needs, and "Here's Help," which focused on, among other subjects, the drug problem prevalent in the area. Equally important, during its weekday "Morning Show," broadcast from 6 to 10 a.m., there were numerous discussions on a wide variety of issues of importance to the community. Additionally, WHYI broadcast traffic reports, weather reports, information on school closings and school lunch menus, and the scores of local sporting events. While WHYI's news broadcasts centered in the morning hours, it is found that these newscasts also served the public in the area. Southeast's efforts to minimize WHYI's programming efforts is rejected. The Commission recently indicated that each licensee has very broad discretion in selecting programming that it believes responsive to the community's needs and problems, and it would be inappropriate for the Commission to substitute its judgment for the editorial discretion accorded WHYI as to the scheduling of its programming designed to meet community needs. *Programming Information in Broadcast Applications*, 3 FCC Rcd 5467 (1988); *Comparative Renewal Process*, 3 FCC Rcd 5179 at 5181 (1988).

44. Both the Commission and the courts have emphasized that a station's reputation in its community as a local outlet must be given significant consideration. It has long been recognized that community leaders, who are active in charitable and civic organizations, and members of the general public are in a unique position to evaluate a local station's performance in meeting community needs. As detailed in paragraphs 93-116 of the findings, testimony was given by 23 public witnesses from governmental, charitable, civic, and business organizations in support of WHYI's performance as a local outlet.<sup>33</sup> This outpouring of public support and the total absence of any public witnesses questioning WHYI's operation is further

evidence of the licensee's sensitivity to the needs of the community and its successful meeting of such needs. The Presiding Judge, *supra*, evaluated the evidence with respect to WHYI's practices and procedures relative to sponsorship identification, and has found that such evidence does not warrant disqualification of WHYI. It is further ruled that the evidence adduced does not seriously impact upon the finding that WHYI's programming has been meritorious. The deficiencies with respect to sponsorship identification matters were not of such a nature as to seriously detract from WHYI's meritorious programming efforts.

45. It is concluded, as urged by the Bureau, that WHYI's ongoing ascertainment efforts and resulting programming demonstrated a sensitivity and responsiveness to the needs of the community, and that such performance warrants a characterization of "substantial" or "meritorious," resulting in the award of a strong comparative preference to WHYI.

**(b) Integration and Diversification**

46. Metroplex proposes no integration of ownership and management and, therefore, is entitled to no integration credit. Southeast, on the other hand, claims that it is entitled to credit for 100 percent integration. This claim rests upon the fact that Southeast, as a limited partnership, has a twotiered ownership structure with the limited partners having a 96 percent equity interest and the General Partner, Gloria Butler, having a 4 percent equity interest. Southeast proposes that Gloria Butler will be the full-time General Manager of its proposed facility. The Commission has made clear that it will accord applicants flexibility in structuring their proposal, without "second-guess[ing] applicants' business judgment - so long as it is, in fact, a good faith business decision." *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 (1988). However, it is not only appropriate but necessary that such twotiered structures be scrutinized with great care. Such putative ownership structures must be evaluated to guard against sham applications that manipulate comparative criteria to maximize a paper preference. The Presiding Judge is obligated to determine whether Southeast's proposed structure genuinely reflects the composition of the applicant, or whether it is "an utterly artificial construct" devised exclusively for the purpose of exploiting the Commission's comparative evaluation process. *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4088 (Rev. Bd. 1988).

47. As conceded by Metroplex, Southeast's limited partnership agreement contains all of the "inclusive provisions" required by the Commission's attribution policy.<sup>34</sup> Stated simply, there is nothing in the Southeast partnership agreement that undermines the *bona fides* of the proposed ownership structure. However, this fact does not end the inquiry, and, as set forth, *infra*, the particular facts with respect to the conception, initiation, formation, and prosecution of the Southeast proposal mandates the conclusion that this limited partnership structure is not entitled to the 100% integration credit it claims. The findings (paras. 119-185) detail the history of the initiation and formation of Southeast. These findings establish that it was the limited partners, at the initiation of communications counsel, who formulated the plan for the creation of Southeast and the filing of the construction permit application. Perry and his associates, with the guidance of communications counsel, arranged the essential details of the proposal, specifying the percentages of

ownership and the method of financing, and then, and only then, sought out a General Partner who would have the comparative strengths of being a female and a member of a minority group. The Perry group of limited partners, who hold 75% of Southeast's equity, interviewed Gloria Butler, the prospective General Partner, and limited her equity interest to 4 percent. Butler, on her part, recognizing that she was not required to make any financial investment whatsoever in the venture, accepted the very modest equity interest and the role established for her by these limited partners.

48. The Review Board, in recent years, has considered the question whether ownership of less than a 5 percent interest by the "active partner" is so insubstantial as to warrant no credit being accorded ownership.<sup>35</sup> The Commission, to date, has not directly spoken on this question and, the Presiding Judge is disinclined to award any ownership integration credit to Gloria Butler, whose 4 percent equity holding is deemed so insignificant by the Commission as to be neither cognizable or even reportable as a media ownership interest. Nevertheless, the Presiding Judge, like the Board, will give Southeast the benefit of the doubt and rule that the fact that Gloria Butler's ownership interest is less than 5 percent does not, standing alone, warrant holding that no integration credit is to be accorded Southeast. *Independent Masters, Ltd.*, 104 FCC 2d 178, 193 (Rev. Bd. 1986); *Religious Broadcasting Network, supra*. However, the modest nature of the General Partner's equity interest in Southeast is a factor to be considered in determining whether the claimed 100% integration should be awarded.

49. Southeast's contention that the Commission's ruling in *Victory Media*, cited *supra*, mandates ruling that Southeast's two-tiered limited partnership is *bona fide* and entitled to 100 percent integration credit is rejected. In the instant case, it was communications counsel and Perry, one of the limited partners, who were responsible for the initiation and formulation of the venture. It was Perry who helped to recruit many of the other limited partners, and it was this group of limited partners (the Perry group) that determined the legal form of the entity, its equity capital and contribution structure. Additionally, it was the Perry group of limited partners which approved the financial arrangement with communications counsel and approved the selection of Gloria Butler (Butler) as the General Partner. Butler played no role in making these important decisions and had not been chosen as the General Partner at the time of such discussions. Also significant is the fact that Butler, as the General Partner, has abdicated any control over Southeast's funds. Her control of the partnership's bank account is meaningless because of the trivial sum that was deposited in that account. The Presiding Judge agrees with Metroplex that Butler's power of the purse is "illusory."

50. Additionally, the Perry group of limited partners, at the May 16, 1986, meeting, agreed that they would retain the right to determine whether, at the time the Southeast application was designated for hearing, they would abort the project. This determination was made before the General Partner was even chosen, and it was clear that the General Partner, Butler, had no voice with respect to this matter. Even after Butler became the General Partner, her role was minimal. She played no part in negotiating or revising the CMNY loan commitment for Southeast. She similarly played no role in hiring Southeast's engineer or its broadcast consultant. Nor was she aware of

the compensation to be paid these agents of Southeast. Lastly, her consent to transfer a portion of Baer's limited partnership interest to others was a mere formality, in that she made no effort to obtain any information about the new limited partners. The findings disclose that the members of the Perry group looked to Perry as the experienced broadcaster and it was because of his background and experience that they committed themselves to the venture. Butler has no broadcast experience and has played, at most, a minimal role with respect to the prosecution of the Southeast application. The particular facts in this case contrast sharply with the facts in *Victory Media*, where all out-of-pocket expenses were divided evenly among the voting and nonvoting shareholders; the nonvoting shareholder knew the voting shareholder for 10 years and the equity interests of the voting shareholder had been negotiated. It is ruled that the totality of the evidence mandates holding that Southeast has failed to establish that its two-tiered ownership structure is *bona fide*, warranting the award of intergration credit.<sup>36</sup> The record does not support any sound business reason for Southeast's structure, other than an attempt to garner a comparative integration credit and, as a result, it is ruled that its integration proposal is rejected as a sham. *Northampton Media Associates*, cited, *supra*.

51. Turning to the question of the diversification of the mass media, it should be noted that media interests of truly passive, insulated, nonattributable limited partners are not counted against the applicant. *Daytona Broadcasting Company*, cited, *supra*. However, it is ruled that the media interests of Southeast's limited partners are attributable to Southeast for diversification purposes in view of the holding that its two-tiered structure was not *bona fide*. The findings set forth the extensive media interests of Metroplex, both in Florida and in other areas of the country and, also, the media interests of the Southeast limited partners. It is ruled that Southeast is entitled to a moderate preference with respect to the diversification of the media of communication.

52. As fully discussed, *supra*, the Commission and the courts have both emphasized that primary significance is to be accorded a broadcaster's past performance, since this factor affords the strongest and most reasonable basis for determining whether the public interest will be served by license renewal. It has been determined that Metroplex is entitled to a strong preference for its past broadcast operation during the relevant license period. This preference is controlling as to the comparative choice made between Metroplex and Southeast. Even had 100% integration credit been accorded Southeast, with the resultant improvement in Southeast's diversification posture, it would still be ruled that this would not be sufficient to overcome the strong preference to Metroplex for its meritorious broadcast record in the operation of Station WHYI during the relevant license period.

ACCORDINGLY, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with Section 1.276(d), 47 C.F.R. 1.276(d),<sup>37</sup> the application of Metroplex Communications, Inc., for renewal of license of Station WHYI, Ft. Lauderdale, Florida, IS GRANTED and the construction permit of Southeast Florida Broadcasting Limited Partnership IS DENIED.

## FEDERAL COMMUNICATIONS COMMISSION

Thomas B. Fitzpatrick  
Chief Administrative Law Judge

### FOOTNOTES

<sup>1</sup> Metroplex's "Statement Re Integration Proposal and Renewal Expectancy" filed April 7, 1987, pp. 1-2; and "Amendment to Statement Re Integration Proposal and Renewal Expectancy" filed May 20, 1987, p. 1.

<sup>2</sup> It was station policy to require that non-entertainment programming be logged. (Southeast Ex. 9; Tr. 540-44, 550-51) For this reason, the findings are limited to the non-entertainment programming detailed herein.

<sup>3</sup> Other topics discussed on "Here's Help" included mass transportation, corruption in the police department, the deaf, sexually abused children, physical fitness, birth control, Russian immigrants, drunk driving, crisis intervention and runaways. (Metroplex Ex. 1, att. 29)

<sup>4</sup> Ross was uncertain as to when Siani assumed that position. A report filed with the FCC in December 1986 described her title as of November 15, 1986, as "Public Affairs/Entertainment Reporter." (Tr. 452-53) Metroplex indicated in a response to interrogatories that Siani devoted about 50 percent of her time to non-entertainment programming. (Tr. 501)

<sup>5</sup> Hersey had, however, been described as holding the title of news announcer as of November 15, 1986, in a report filed with the Commission. (Tr. 451-52)

<sup>6</sup> The frequency and duration of the PSAs are not established as specific evidence.

<sup>7</sup> WHYI logo appeared on everything the March of Dimes printed relative to the events, including 200,000 sponsor forms and 2,000 posters. (Tr. 3822-23)

<sup>8</sup> In order to avoid confusion with Lewis I. Cohen, the attorney, who is hereinafter referred to as Cohen, the principal in Southeast, Gerald B. Cohen, will be referred to by reference to his proper name.

<sup>9</sup> Butler made no independent inquiries about Southeast's principals. She did seek out Lee Dunham at a convention in early May 1986 to inquire about Cohen's character and reliability as an attorney, because "if I entered into this, I would be relying heavily and placing a lot of trust in this person." (Tr. 2025-26) She felt that Cohen "was the person I wanted to . . . be sure about." (Tr. 2027)

<sup>10</sup> Cohen's firm also paid or will pay for Butler's trip to Washington, D.C., to testify at the hearings out of the \$200,000 in capital contributions made to the firm, as the "prosecution fund." Butler did not know who paid for the limited partners' trips to Washington, D.C., to testify, but assumed the payment was made by counsel from the "prosecution fund." (Tr. 2145)

<sup>11</sup> Butler initially recalled that she had requested that Baer be present and that he was. (Tr. 2078) She later corrected her testimony. (Tr. 2186-88)

<sup>12</sup> Butler could not explain why the agreement requires the consent of counsel to such transfers. (Tr. 2251)

<sup>13</sup> Section 12(a) of the partnership agreement provides that any limited partner must first obtain the written consent of the General Partner and her counsel before the transfer of any portion of a limited partner's interest in the partnership. More

importantly, it further provides that such consent may be withheld "at the sole discretion of the General Partner." (Southeast Ex. 12, p. 8)

<sup>14</sup> Butler's initial understanding of this provision was the same as Perry's until she, too, was "corrected" by Southeast's counsel. (Tr. 1484-85, 2289-90)

<sup>15</sup> Butler did claim some "limited" knowledge of the salary for a sales manager based on her acquaintance with a sales manager with a local AM station with a format different from that she proposes. (Tr. 1507-09)

<sup>16</sup> See Southeast Ex. 3, att. 1, pp. 2-4: General Manager - \$18,750; Executive Secretary - \$4,000; Sec'y Receipt/Bookkeeper - \$2,700; Program Director - \$12,500; Music Director - \$10,000; News Director - \$6,250; Public Affairs Director - \$6,000; 2 News Announcers - \$10,700; General Sales Manager - \$9,000; Traffic Manager - \$3,500; Assistant Traffic Manager - \$3,250; 5 Account Executives - \$20,795; Contract Engineer - \$3,000. These figures total \$110,445, which is approximately 46% of the total budget of \$240,709.

<sup>17</sup> Hoover explained that the word "prohibitive" in his letter meant "economically unfeasible." The cost of duplicating the Gannett master antenna would be "sky high." (Tr. 3686) "The entire package is beyond consideration." (Tr. 3689)

<sup>18</sup> In December 1987, Butler maintained that she did not know what documents Diaz was given or instructed to review in connection with his assignment. Nor did she know whether he was made aware of the amount of Southeast's financing, whether he was given any ceiling on his estimates, or whether he consulted with Hoover. (Tr. 1530, 1901-05) When later asked to reconcile her receipt of Boyce's letter with her testimony that she was ignorant of what instructions were given to Diaz, Butler conceded that she received the letter shortly after September 21, 1987, but said that she did not recall it during her December 1987 testimony. She claimed that she "read the letter casually without giving it much thought and filed it with other papers." She "did not give any thought" to Boyce's instructions regarding what was available for operating costs, and did not discuss the letter or any limitations on Diaz's estimates with counsel or anyone else. (Joint Ex. 3)

<sup>19</sup> Butler had no explanation as to why she and Cohen omitted telephone transmission lines from the 1986 budget. (Tr. 2013-14)

<sup>20</sup> The playlist did not list "oldies," which were hits of the distant past, or "recurrents," which were hits of the recent past, even though such records were occasionally played. (Metroplex Ex. 3, ¶ 7; Joint Ex. 2, ¶ 3) Nor did it list "test" records, which were new, unestablished records whose prospective popularity the station sought to test by playing them in overnight hours and gauging listeners' responses. (Tr. 1286-87, 1290; Joint Ex. 2, ¶ 3)

<sup>21</sup> Southeast's counsel reported on the last day of the hearing that he had spoken to the hotel in an effort to clarify matters and, as a result, felt it was best to "just leave the record as it is." (Tr. 4397)

<sup>22</sup> Amadeo, during his deposition, defined a paper add as a record reported to the trade press that was not aired. (Tr. 1153-56, 1170-72) However, at the hearing, he explained that he had failed to state at his deposition that the record aired, but not in normal rotation. (Tr. 1156-57)

<sup>23</sup> "Cathy" and "Kathy Crews" presumably refer to Cathy Cruise, identified at Metroplex Ex. 90, p. 1.

<sup>24</sup> 47 C.F.R. 73.1212 was adopted by the Commission to carry out the statutory requirements of Section 317 of the Act, as amended. The discussion and resolution of this issue will concern itself solely with whether Metroplex violated the statutory provisions.

<sup>25</sup> Southeast's contention that David Ross' May 1, 1984, letter to the mother of the Jackson family evidences a willingness to use station programming as "a means of extracting favors from record industry sources" is rejected. Ross adequately explained that he was referring to assistance with concert tour arrangements in Florida, and not to promotion of Jackson records on Metroplex stations. (Tr. 844, 869-71)

<sup>26</sup> House Report No. 1800, 86th Congress, 2d Session, June 13, 1960 (*House Report*); Pike and Fisher Current Service, p. 10:413-10:432. See also *Sponsorship Identification*, 40 FCC 141, 144 25 RR 1575 (1963).

<sup>27</sup> The courts have held that an agency may not impose a different standard than that imposed by Congress. *Ernst & Ernst v. Hofelder*, 425 U.S. 185, 212-214 (1976).

<sup>28</sup> Southeast notes that Robert Walker and Frank Amadeo were members of the Music Committee and argues that the "inmates were running the asylum." However, there is no evidence that there was any unwarranted or excessive play of the records of any record companies.

<sup>29</sup> The Review Board has stressed that to permit the principal of an applicant to certify to the financial resources of "passive principals," based on nothing more than the "undocumented assurances" of such principals would result in negating the efficacy of the sworn certification requirement. *Religious Broadcasting Network*, 3 FCC Rcd 4085, at 4093 (Rev. Bd. 1988).

<sup>30</sup> The Presiding Judge agrees with Metroplex that, contrary to Butler's contention, *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), is distinguishable in that Garcia had made "serious and reasonable efforts . . ." to ascertain costs and the sufficiency of funds to finance the proposal.

<sup>31</sup> The Presiding Judge, *supra*, rejected the contentions of Metroplex and the Bureau that the \$500,000 bonus to counsel should appropriately be considered as part of the estimated operating cost and, therefore, the argument that this cost item precludes finding Southeast financially qualified is rejected for the reasons articulated, *supra*.

<sup>32</sup> It should be noted that, to the best of the Presiding Judge's knowledge, this is the first decision in a renewal comparative proceeding to be issued where, as a result of the Commission's elimination in 1981 of quantitative programming guidelines, that data was not available. The Commission, since 1981, has not required licensees to submit quantitative programming data with the renewal application and, as a result, there was not readily available information as to how other stations in WHYI's market performed so as to permit a comparison of WHYI's performance quantitatively with such stations.

<sup>33</sup> The fact that many of the witnesses who testified on behalf of WHYI were representatives of charitable and civic groups in whose activities WHYI had been actively involved does not detract from the weight to be accorded their testimony. These individuals were in an excellent position to chronicle WHYI's contributions to community activities and, contrary to Southeast's contention, appropriately fulfill the role traditionally accorded public witnesses expressing their evaluation of a station's performance.

<sup>34</sup> *Attribution of Ownership Interest*, 97 FCC 2d 997 (1984), reconsidered, 58 RR 2d 604 (1985), further clarified, 1 FCC Rcd 802 (1986). See *Daytona Broadcasting Company, Inc.* 103 FCC 2d 931, 934-935 (1986) "(attribution of ownership interest policy applicable in comparative evaluations)".

<sup>35</sup> The Review Board, in the instant case, ruling on a discovery matter noted that, in general, the Commission regards ownership interests of less than 5 percent to be sufficiently insignificant as to be wholly noncognizable for attribution purposes. *Memorandum Opinion and Order* (FCC 87-R37), released July 31, 1987.

<sup>36</sup> The Presiding Judge rejects Metroplex's claim that integration credit should not be awarded to Butler because she failed to commit to a specific managerial position in either the Integration Statement filed with the Presiding Judge or Southeast's direct written affirmative case. The Presiding Judge rules that both the Integration Statement and the Southeast exhibits made clear that Butler was to exercise a managerial role in the operation of the station. The Presiding Judge also rejects Metroplex's claim that Butler failed to demonstrate that she would terminate her duties with her family-owned McDonald's franchises and devote full time to Southeast. The record shows that Butler's duties with the McDonald's franchises can be assumed by another individual and that she has committed herself to the fulltime role of General Manager of the proposed station.

<sup>37</sup> In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).