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

MM Docket No. 88-421

In re Applications of

MID-OHIO/CAPITOL COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870515MK
SCIOTO BROADCASTERS, LIMITED PARTNERSHIP	File No. BPH-870514MU
MID-OHIO RADIO LIMITED	File No. BPH-870515NM
CLEAR CHANNEL COMMUNICATIONS, INC.	File No. BPH-870515NN
HORACE E. PERKINS	File No. BPH-870515NP

For Construction Permit for a New FM station on Channel 298A in Columbus, Ohio

Appearances

Stephen Diaz Gavin, J. Jeffrey Craven on behalf of Mid-Ohio/Capitol Communications Limited Partnership; *Lawrence Bernstein* on behalf of Mid-Ohio Radio Limited; *William E. Kennard* on behalf of Scioto Broadcasters Limited Partnership; *William K. Keane, Michael Drayer* on behalf of Clear Channel Communications, Inc.; *Robert B. Jacobi, Lawrence N. Cohn, Cheryl R. Glickfield* on behalf of Horace E. Perkins; and *Jerry M. Hermele* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 12, 1990; Released: January 24, 1990

1. Five applicants, out of twelve originally designated for a comparative hearing, are competing for a construction permit to operate a new Class A FM station at Columbus, Ohio. The applicants were designated for hearing on August 15, 1988. *Hearing Designation Order*, 3 FCC Rcd 5480 (1988). Various post-hearing filings and the following issues remain to be resolved in this decision:

1. To determine, with respect to Mid-Ohio:

(a) The basis for, and the validity of, the cost estimates projected by Mid-Ohio to build and to operate its proposed facilities without revenues for three months;

(b) Whether Mid-Ohio has sufficient net liquid assets on hand, or available from committed sources, to construct and operate its proposed facilities for three months without revenues;

(c) Whether, in light of the evidence adduced pursuant to the foregoing issues, Mid-Ohio is financially qualified;

(d) To determine, (i) whether, in light of the evidence adduced pursuant to issue (c) above, Mid-Ohio made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission and (ii) if (i), above, is resolved in the affirmative, the effect thereof on Mid-Ohio's basic qualifications to be a Commission licensee.

2. To determine whether the proposal of the following applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Mid-Ohio, Scioto, Radio, Communications, and Perkins.

3. If an environmental impact statement is issued with respect to Perkins, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether its proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. The Bureau, in the *HDO*, found that data submitted, when there were 12 applicants, indicated there would be a significant difference in the size of the areas and populations which would receive service from the proposals. The Bureau directed that comparative consideration should be given to service which the applicants would provide within 1 mV/m or greater intensity, together with the availability of other primary aural services in primary signal areas. All of the remaining applicants in this proceeding have executed the Joint Stipulation Regarding Areas and Populations which provides that no party is entitled to a preference for its proposed coverage.

3. A prehearing conference was held on November 22, 1988. Tr. 1-22; *Order*, FCC 88M-3052, released September 19, 1988. Written testimony was exchanged on June 12, 1989 and hearing sessions to cross-examine witnesses on that testimony were held on June 26 (Tr. 23-231/349), June 27 (Tr. 350-589/624), June 28 (Tr. 625-875/924), June 29 (Tr. 925-1139/1224), June 30 (Tr. 1225-1354/1425), and July 5, 1989 (Tr.1426-1553). The record was closed on July 5, 1989. *Order*, FCC 89M-1858,

released July 12, 1989. Proposed findings and conclusions were filed by the applicants and the Bureau on October 4, 1989 and replies were filed on October 31, 1989.

POSTHEARING FILINGS

Radio's Motions to Disqualify Counsel for Perkins, Enlarge Issues Against Perkins and Clear Channel, and Reopen the Record

4. Radio moves to disqualify counsel for Perkins on the grounds that Perkins' law firm, Cohn & Marks, has a conflict of interest in representing Perkins because it ordinarily represents Clear Channel, another applicant in this proceeding. Clear Channel holds 20 broadcast and television licenses, 4 LPTV licenses or permits, and operates a radio news network. In all regulatory matters involving those licenses or applications for new licenses, Cohn & Marks has been and is counsel to Clear Channel. Radio claims that Cohn & Marks' interest in two applicants has resulted in Clear Channel and Perkins treating each other not as adversaries but with deference. Radio believes that this has been exhibited by Clear Channel's allegedly cursory examination of Perkins and its failure to depose him. Radio describes this behavior as collusive and believes that it has resulted in an abuse of the Commission's processes and subverted fairness in this proceeding.

5. Radio argues that Cohn & Marks is in a position to use or withhold confidential information which it has gained from Clear Channel and Perkins and that it can do so to the advantage or disadvantage of each of them. Radio urges that Cohn & Marks' conduct "offends" the ABA Code of Professional Responsibility Disciplinary Rule 4-101(B), which prohibits various actions regarding client confidences, and Rule 5-105, which prohibits multiple employment if it adversely affects counsel's judgment.

6. Perkins argues that the motion to disqualify is "egregiously" untimely and that Radio has no interest in the issue raised. Perkins, according to lawyers at Cohn & Marks, hired Cohn & Marks to represent him in this proceeding before Clear Channel approached the firm about representing it. Cohn & Marks told Clear Channel it would have to find other counsel and it told Perkins that, if the firm continued to represent him, it would not take any adverse position against Clear Channel's interest because the firm had represented Clear Channel and would continue to represent Clear Channel in all other regulatory matters. Perkins decided he wanted the firm to continue to represent him. Perkins believed Clear Channel such a weak applicant, it would not be necessary for Cohn & Marks to try to raise issues about Clear Channel's proposal. Perkins represents that he gave informed consent.

7. Perkins argues that, pursuant to the canons of ethics governing lawyers who practice in the District of Columbia, Cohn & Marks could represent Clear Channel and Perkins simultaneously if the firm's independent judgment will not be or is unlikely to be adversely affected. Cohn & Marks asserts that Perkins understands that the firm's independent judgment will be adversely affected in representing him because the firm cannot use any information it has about Clear Channel to Perkins' benefit or Clear Channel's disadvantage. Even though it cannot exercise independent judgment on Perkins' behalf, Cohn & Marks asserts that the canons of ethics permit the firm to act on the behalf of Perkins and Clear Channel if the clients understand the restraint on the firm's judgments and give their consent. In addition, Cohn & Marks argues that Radio would need to show an actual conflict to deprive Perkins of his counsel of choice. Although Perkins and Cohn & Marks argue the Commission cannot make that determination because of the risk of depriving Perkins of his representation, Joel Levi and Robert Jacobi, lawyers in the firm, urge that they could, and would withdraw as Perkins' lawyers, if in their judgment, an actual conflict arose.

8. Perkins argues that Radio's motion should be dismissed because it has no stake in the alleged conflict and the motion is untimely. Perkins asserts that "no substantive or procedural disadvantage" might be caused to Radio from the alleged conflict and, therefore, Radio's only reason for raising the issue is to seek an impermissible tactical advantage. Perkins also points out that Cohn & Marks has represented him in the proceeding for over two years during which time the substantive gathering and hearing of evidence has taken place. Perkins claims that Radio could have determined at the outset of the proceeding from public records of the Commission that Cohn & Marks represented Clear Channel. In addition, Perkins represents that Cohn & Marks told all counsel at a meeting on December 13, 1988 that the firm also represented Clear Channel. Perkins argues, moreover, that Cohn & Marks had no obligation to reveal to the Commission its simultaneous representation of Perkins and Clear Channel.

9. Radio petitions to enlarge issues against Perkins and Clear Channel to determine whether Perkins and Clear Channel were dishonest in not revealing their simultaneous representation by the same counsel. Radio also petitions to enlarge issues against Perkins to determine whether Clear Channel is a real-party-in-interest in Perkins' application. Radio concedes that the petition is late under the time requirements of §1.229 but it urges that its counsel has been busy preparing proposed findings and could not concentrate on issues regarding other applicants. Radio points out that in July it hired new counsel and that he was unfamiliar with the case. Whatever the merits of those arguments, Radio believes the issues it is raising should be designated because they are of decisional significance and present substantial public interest questions.

10. Radio argues that Perkins and Clear Channel withheld Cohn & Marks' representation of each of them and that Clear Channel failed to effectively examine Perkins on his proposal during the discovery and hearing phases of this proceeding. Radio points out that Clear Channel had the primary responsibility to examine Perkins' proposal under the procedures applicable to this case and it did not fulfill that obligation. Radio maintains that Cohn & Marks put itself in a position where it could not act ethically. The firm, Radio urges, was ethically bound to use its knowledge about Clear Channel to assist Perkins and, at the same time, the firm was ethically prohibited from revealing any information it had about Clear Channel to Perkins.

11. Radio also asserts that because Clear Channel is one of Cohn & Marks' major clients, it cannot be expected that the firm would decline to represent Clear Channel in favor of Perkins. This view leads Radio to assert that Perkins must be a front for Clear Channel's interests.

Radio also asserts that Perkins and Clear Channel's failure to reveal their representation by Cohn & Marks has been an abuse of the Commission's processes.

12. Perkins responds to Radio's petition by pointing out that while it had a responsibility under procedures adopted for this proceeding to examine Clear Channel, Robert Jacobi, a lawyer at Cohn & Marks, decided that the firm could not examine Clear Channel on Perkins' behalf. Mr. Jacobi states in a declaration that he "mention[ed] to other counsel in the proceeding that Cohn and Marks represents Clear Channel in other contexts." Declaration, dated September 26, 1989, at 4. He claims that he instructed Lauren Bloom, an associate in his firm, to inform all counsel at a meeting on December 13, 1988, that the firm would be unable to carry out its responsibility to examine Clear Channel at deposition and hearing because Cohn & Marks also represents Clear Channel. *Id.* Ms. Bloom states in a declaration that she told the other counsel about Cohn & Marks representing Clear Channel at the December 13, 1988 meeting.

13. Perkins argues that, if Radio were going to raise the representation issue, it should have done so following the December 13, 1988 meeting. Perkins maintains that the Commission must also have known about Cohn & Marks' representation of Clear Channel, since the firm has represented Clear Channel for nearly 20 years and "filed literally hundreds of documents with the Commission on its behalf." In any event, Perkins urges that Cohn & Marks was not required to inform the Commission about its dual representation under any Commission rule. Perkins asserts that the Legal Ethics Committee of the District of Columbia Bar has held that an attorney need not reveal to a "court" or opposing counsel "multiple representation." Perkins argues that Cohn & Marks' duty was only to its clients.

14. Perkins points out that if Clear Channel were a real party in interest in his application there would have been no reason for Clear Channel to have applied. Clear Channel, Perkins believes, would have been more likely discovered if it joined the proceeding. Perkins also notes that, while Radio urges that Clear Channel did not examine Perkins in earnest, it has not pointed to any questions that were not asked. Perkins claims that, if there had been other questions to have been asked, McCall, another applicant, could have asked those questions since it too had responsibility for examining Perkins. Finally, Perkins believes that the fact that he has rejected offers of settlement from Clear Channel signifies that Clear Channel has no interest in his proposal.

15. Clear Channel points out that Radio does not claim that Clear Channel has a conflict since only a party's counsel has an ethical obligation to avoid conflicts. Clear Channel also urges that as long as Cohn & Marks continued to make filings for Clear Channel, the Commission was adequately informed about the simultaneous representation of Perkins and Clear Channel by Cohn & Marks. Clear Channel, in any event, claims it aggressively attempted to determine if Perkins was qualified. It represents that it went so far as to investigate public records in Columbus to determine if any evidence existed that might have reflected on Perkins' qualifications. Clear Channel states that Radio has incorrectly argued that Clear Channel did not depose Perkins, since it did do so. In other respects Clear Channel makes the same arguments as Perkins.

16. Radio replies to the oppositions by claiming, but not reliably supporting the claim, that Perkins did not inform other counsel except Scioto's counsel. Radio observes that Clear Channel does not support Cohn & Marks in their claim that the firm informed the other parties that it represented both Perkins and Clear Channel. Radio points out that Perkins and Clear Channel do not refute that the presiding officer was not informed about Cohn & Marks' representation. Radio also believes that while Clear Channel investigated Perkins, it waited until it was too late to timely raise any issue that it might have found. Radio, in response to the argument that it had pointed to no relevant questions that were not asked of Perkins, now provides areas where Perkins should have been questioned. Radio does not, however, suggest any information that was not revealed that would influence the outcome of this proceeding. Radio argues, independently, that its showing on the issues it raises warrants reopening the record. Both Perkins and Clear Channel argue that Radio's claims are without merit.

DISCUSSION

17. Cohn & Marks admits that it represents Perkins in this proceeding and the applicant Clear Channel in all other Commission proceedings. The firm concedes that it had to make special arrangements in order to represent both parties and that those arrangements act as a restraint on its professional judgment. Cohn & Marks told Perkins that they could not tell him any information about Clear Channel that might be helpful to defeating Clear Channel's application. Perkins agreed to this because, in his view, it made no difference to his success. He believes that Clear Channel's comparative proposal is not competitive. His assessment is premised on Clear Channel's failure to promise operation of the station by owners and the fact that it already holds licenses for 20 broadcast stations. Thus, when Cohn & Marks stated to Perkins that it could not represent the interests of Perkins and Clear Channel, its longtime client, Perkins consented. Clear Channel also consented because Cohn & Marks promised to comply with DR 4-101(B) --not to reveal a confidence about Clear Channel, not to use a confidence to Clear Channel's disadvantage, and not to use a confidence about Clear Channel to the firm or Perkins' advantage-- and its agreement not to examine Clear Channel during discovery or at the hearing. Those concessions only work to Clear Channel's advantage. Cohn & Marks represents, in addition, that it would protect Perkins' interest if a matter about Clear Channel's qualifications came to its attention. The firm would then tell Perkins that there was a conflict. What would then result is not known since that apparently has not happened.

18. It appears that Cohn & Marks has complied with applicable Disciplinary Rules 4-101(B) and believes it has complied with 5-105(C). *See Dorothy J. Owens*, 60 Radio Reg. (P&F) 2d 1279, 1282 n. 3 (Review Bd. 1986). It is less clear whether Cohn & Marks has complied with Ethical Consideration 2 of Canon 9, which advises lawyers to act "in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession," and whether Cohn & Marks and Perkins had the interest of the public as its focus when they agreed to proceed. *See Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F. 2d. 1551, 1555 (D.C. Cir. 1988). The integrity and efficiency of the legal system would not be

served if information came to Cohn & Marks' attention that Perkins should have been told. Cohn & Marks would then have to either violate the client confidence disciplinary rule or withhold information from Perkins. It might also have to ask Perkins to find a new lawyer at a time when it would work to his disadvantage. While there are hundreds of lawyers who specialize in the regulation of broadcast communications, that fact is only an argument for always being able to insure that the appearance of fairness is being achieved as well as fairness. Perkins believes that his proposal is so strong that almost anyone could have represented him and he would prevail.

19. One other ethical factor is presented by Cohn & Marks' action: The licensing process is not like a bipolar civil action in a district court; it is an administrative proceeding which has as its focus the interest of the public, not the private rights of the litigants. Cohn & Marks' method of protecting Clear Channel ignored Perkins' obligation and the firm's obligation to assist the Commission in arriving at the best choice for the Columbus facility. Perkins and Cohn & Marks essentially agreed not to review Clear Channel's proposal or take any steps to inform the Commission about Clear Channel. Decisions like that undermine the integrity of the process. Their decision, however, does not appear to have had any impact in this case. There were a number of other applicants who could review Clear Channel's proposal and Clear Channel actually does not have a comparative proposal of much merit. On the other hand, counsel for Perkins was most able and aggressive in pursuing the other applicants and had he pursued Clear Channel or Perkins' proposals, the record might be different.

20. It is not "obvious," as required by DR 5-105(C), that Cohn & Marks could adequately represent anyone in this proceeding but Clear Channel. And once the firm had begun to provide advice to Perkins, it could no longer adequately represent Clear Channel. Mr. Jacobi explains in his declaration that the firm had provided legal advice to Perkins from 1984 to April 17, 1987 before Clear Channel approached the firm. In addition, Perkins could hardly have given informed consent to Cohn & Marks' plan that it would not tell him anything it knew about Clear Channel that would be of help to him. Since Perkins did not know what the lawyers at Cohn & Marks knew, he could not have determined that it was not to his disadvantage to remain with Cohn & Marks. That restraint, Cohn & Marks partner, Joel Levy, represents, did not matter since the firm did not know anything about Clear Channel that would help Perkins. However, Levy's representation focuses on evidence that Perkins might have introduced in the hearing; Perkins also has been repeatedly approached by Clear Channel to agree to settle the case and there is every reason to believe that Cohn & Marks' knowledge about Clear Channel could be very helpful to Perkins' interest in a negotiated settlement of the proceeding. The Commission's rules specifically provide for settlements and Commission policy encourages settlement.

21. There is no merit to Radio's claim that Perkins or Clear Channel acted improperly. They were not bound to make an ethical assessment for their lawyers. There is no evidence that Perkins had information about Clear Channel that should have been brought to the attention of the Commission. Moreover, there is no evidence that Clear Channel failed to question Perkins on relevant information. Radio claims that Clear Channel did not depose Perkins, but it did. Radio's petition to enlarge issues against Clear Channel and Perkins will be denied. Radio's motion to disqualify Cohn & Marks comes too late in the proceeding to have any impact on the proceeding. The proposed findings and replies have been filed and all that remains is for this decision to be issued. If Radio believes that Cohn & Marks should be censored in some manner, it should file a complaint with the appropriate bar group or the Commission's general counsel. The presiding officer is concerned only with the issues to be decided and the qualifications of the parties in this hearing. The ethical decisions made by counsel, it may be found, affect those determinations if they are timely raised. However, when they are raised after the proceeding has been held, there is no need to take any action unless it can be shown that the record is incomplete or unreliable as a result of counsel's ethical decisions. Here, other parties filled in the record in the areas where counsel did not participate and there is no evidence that the record is inaccurate or incomplete. Radio's motion to disqualify counsel for Perkins will be denied.

Radio's Petition to Reopen Record to Receive Additional Testimony of Karen Murray

22. Radio petitions to reopen the record to receive additional testimony from its principal, Karen Murray. The ostensible purpose of the "new" testimony is to respond to "certain erroneous statements" made by the presiding officer in an order issued August 16, 1989. Ms. Murray wants to explain how new counsel was hired. While the whole filing is premised on the need to answer erroneous conclusions, Radio does not identify what erroneous conclusions were made. In the proffered testimony, Ms. Murray claims, inter alia, that the presiding officer "ordered Radio to get another attorney." There was no order directing Radio to obtain other counsel. Radio made that choice on its own for the reasons stated in *Memorandum Opinion and Order*, FCC 89M-2086, released August 16, 1989. Ms. Murray's new testimony is conclusory and self-serving; no public interest benefit would result by adding it to the record. In the August 16, 1989 order it was suggested that the decision that was made by Radio and its counsel about hiring a new lawyer may be relevant to the question of control if the record did not contain substantial evidence on this point; there appears to be evidence in the record that will adequately answer the question. There must come a time when the applicants can no longer add facts to the record.

23. Perkins and Scioto both oppose reopening the record. Scioto points out that when it wanted to explore the question Radio now wants to submit evidence on, Radio opposed the testimony. In fact, it was that request that was the subject of the aforementioned order. Scioto notes that Radio delayed making its request until after the proposed findings had been filed and six weeks after the order about which it complains was issued. Scioto also maintains that Ms. Murray's newly proposed testimony is self serving and contradicts her hearing testimony. Perkins submits some of the same arguments as Scioto. In addition, Perkins points out that Ms. Murray's rebuttal does not respond to the record, since the facts about how new counsel was hired are not in the record. The new information, Perkins urges, is not decisionally significant. Radio has failed to demonstrate that the method by which it hired new counsel is necessary and relevant evidence to assess its proposal. The facts about how it happened to

hire new counsel are already part of the record and they are not as Ms. Murray now claims. Radio's motion to reopen the record will be denied. The time to have requested additional testimony has long since passed.

FINDINGS OF FACT

Issue 1: The Mid-Ohio Financial Issue

24. All applicants in this proceeding were required to establish their financial qualifications and the Mass Media Bureau reviewed the showings. *HDO*, 3 FCC Rcd 5480 (1988). The Bureau stated in the HDO that it assumed each applicant would have legal expenses of $5,000 and a hearing fee of $6,000. *Id.* When an applicant had not provided for those expenses, they were added to the estimated costs. *Id.* In order to establish operation and construction costs for the Bureau's review, Mid-Ohio submitted 1984 estimates for Upper Arlington, Ohio, a suburb of Columbus. Because the estimates were two years old when Mid-Ohio applied in 1987, the Bureau questioned whether the estimates were still accurate and whether they related to the facilities that Mid-Ohio proposed. Therefore, Mid-Ohio was required in the *HDO* to establish the "basis for, and the validity of, the cost estimates," it projected.

25. The Bureau, after reviewing Mid-Ohio's Upper Arlington study, concluded that Mid-Ohio would need more than $662,183. That amount, the Bureau concluded, did not include money for acquiring land and installation of equipment. While Mid-Ohio represented that its projections included installation costs, the Bureau found that the estimate for equipment costs, without installation, made by the supplier were the same as Mid-Ohio's estimate with installation. The Bureau also found that Mid-Ohio's estimate of $351,000 in total costs neglected to provide for three months operating expenses which the Upper Arlington proposal listed as $376,183.

26. Mid-Ohio stated that it would finance its proposal with money from its general partner and four limited partners in proportion to their shares in the partnership. It also submitted a June 26, 1987 letter from AmeriTrust Bank, Cleveland, Ohio which provided that the bank had an interest in lending Mid-Ohio $350,000. However, because the Bureau found that the bank letter was obtained after the application was filed on May 15, 1987, it could not be considered in determining whether the applicant was financially qualified when it certified. Mid-Ohio would, therefore, the Bureau held, have to test its representation against the ability of the partners to finance the proposal. The Bureau found that, based on their shares of equity, the general partner had an obligation to provide $196,855 and each limited partner would need to provide $106,630. However, the Bureau found that the listed proportional interests of the partners equaled only 95% and there was no indicated source for 5% or $32,809 of the needed money.

27. None of the partners, the Bureau found, had supplied documentary support of their ability to provide the money for their share. The Bureau examined, in detail, the balance sheet of Joseph Hewitt, the general partner. The Bureau concluded that Mr. Hewitt had a negative liquid net worth and that he would be unable to meet his proportionate contribution. Mr. Hewitt claimed that the other partners would lend him money to meet his share, but the Bureau found that Mr. Hewitt did not provide any loan commitment statements. The Bureau designated an issue to determine whether Mid-Ohio had the necessary money to construct and operate. In light of Mid-Ohio's showing, the Bureau designated an issue to determine whether Mid-Ohio misrepresented or lacked candor in dealing with the Commission or attempted to deceive or mislead the Commission about its financial qualifications.

The Cost Estimates Used by Mid-Ohio in Certification

28. Joseph Hewitt claims that he made an error in originally establishing the costs of construction and operation for Mid-Ohio's proposal. Mid-Ohio Exh. 3, at 2. He states that his original estimate of $351,000 in costs, which included $230,000 in bank debt and $71,500 in equity, was in error. *Id.* Mr. Hewitt said that he misread the Upper Arlington estimates. He thought the suggested bank debt of $230,000 and the $230,000 listed for total equipment expenditures represented total construction costs. He also mistook the listing for total equity of $286,000 in the Upper Arlington proposal to be the total first year operating costs. *Id.*, at 2-3. He divided the $286,000 equity item by four and used that as his total three month operating costs. *Id.*, at 3. Those costs, which he then estimated to be $71,500, were added to $230,000 along with legal, engineering and other application costs to reach Mid-Ohio's estimate of $351,500. When Mr. Hewitt was shown the Upper Arlington proposal at the hearing and was asked to identify the correct first quarter estimated cost of operation in the proposal, he was able to do so. Tr. 169-70. And he also was able to identify the cash required, $513,398.50, from that document. Tr. 170. Mr. Hewitt conceded that, if the proper numbers were used, he would have needed at least $513,000. Tr. 480.

29. Before Mr. Hewitt certified, he had obtained a copy of the "General Instructions" to Form 301 and a copy of the March 19, 1987 *Public Notice*, "In the Matter of Certification of Financial Qualifications." Mid-Ohio Exh. 3, at 2. Mr. Hewitt said he did not adjust the two year old estimates for Upper Arlington to match Mid-Ohio's Columbus proposal. Tr. 137. He said that he did not know whether the equipment estimate included installation but he assumed that, if he were going to spend $163,000, the equipment seller would install it at that price. *Id.* He did not spend much time on the estimates. Tr. 138. He believes he gave the estimates to the other partners. *Id.*

The Source of Money to Meet the Estimated Need for Funds

30. Mr. Hewitt said that Mid-Ohio intended initially to rely on contributions from the partners to pay for the station. Tr. 88-89. Mr. Hewitt, in his testimony, said he was expected to provide 31% or $108,965 and that, if he could not provide the money, other partners would lend him the money. Mid-Ohio Exh. 3, at 4. While Mr. Payne told Mr. Hewitt he would cover any shortfall, no details were discussed. Tr. 158-59. The other partners were to provide 17.25% of capital needed, according to Mr. Hewitt. Mid-Ohio Exh. 3, at 4. Mr. Hewitt, when examined, said that the partners would need to provide about $60,000. Tr. 159. He stated that when he provided Mid-Ohio's financial proof to the Bureau, he estimated that he was to provide 30% of $351,500 or $105,450 to finance the proposal. Tr. 156. He received only verbal assurances from the limited partners that they would make their contributions. Tr. 90-91, 108-09, 111, 115, 123. He did not

look at their balance sheets. Tr. 170. When Mid-Ohio sought to justify the liquid net worth of the partners to the Bureau, it claimed that Mr. Hewitt had $39,600, Hubert B. Payne $180,000, Darrell A. Fields $42,950, Dominic L. Ozanne $125,000, and Val C. King $62,116. Mr. Hewitt claimed that he could rely on his $50,000 in holdings in limited partnerships, which he represented were liquid, although they are not publicly traded. Tr. 157-58. He knew at the outset that he did not have sufficient liquid assets; he relied on assurances from Mr. Payne that he would provide the rest needed. Tr. 158. However, there was no written agreement between them. Tr. 159.

31. Mr. Payne's estimated net liquid assets of $180,000 are based on a "put agreement" for 10% of his stock in Channel 19, Inc., licensee of WOIO-TV, Shaker Heights, Ohio. McCall Exh. 5. In addition, Mr. Payne represented that he had agreed to cover any shortfall Mr. Hewitt might have in other applications in which they are both partners. Tr. 364-65. Mr. Payne also agreed to cover Mr. King's shortfall, if any, in Mid-Ohio. Tr. 369-70.

32. Mr. Ozanne's financial commitment is supported by a line of credit to him in his capacity as President and 25% owner of Ozanne Construction Company, Inc. from AmeriTrust Bank. Tr. 490; McCall Exh. 5. There is no evidence that Mr. Ozanne may use the credit for his personal investments. Tr. 493. Mr. Ozanne also claims he could borrow the money from the construction company or his father. Tr. 491.

33. Mr. Fields' estimate of liquid assets of $42,950 is based on having access to a $40,000 certificate of deposit. The certificate is in his spouse's name but held by her father as trustee. Tr. 450-51 Mr. Fields represents that George Forbes, the trustee, who is also his father-in-law, has given oral assurance to him that he can use the CD to pay his commitment. Tr. 454.

34. Mr. King's $62,116 estimate of his liquid assets is based on his ability to obtain a home equity loan. The house is valued at $90,000. Mr. King has $17,000 in equity and there is a $73,000 mortgage. Mr. King also claims that he can mortgage the home of his spouse's parents. Tr. 386-87, 410-11. There is no written support for any of these representations. Tr. 388-89, 411.

35. Hewitt, Payne, Fields, Ozanne and King hold 15% limited partnership interests in applicants for new FM radio stations in Tucson, Arizona, Albuquerque, New Mexico, and Beaumont, Texas. McCall Exh. 4, at 4, 5, 6, 7, 8. They also have an 18% interest (except Mr. King, who has a 28% interest) in an applicant for Roswell, Georgia. *Id.* Mr. Ozanne is a 30% limited partner in an applicant for Huron, Ohio. *Id.*, at 7. Mr. Payne has a 37.5% interest in an application for Louisville, Kentucky. *Id.*, at 5. Mr. Payne and Mr. Fields hold a 37.5% interest in an applicant for Baton Rouge, Louisiana. Tr. 202-03. The Tucson and Albuquerque proposals were filed the same day as this one. McCall Exh. 4, Tr. 95, 111-13, 118-19, 127-28. Mr. Hewitt knew about these applications but he did not know whether the partners had committed funds to them. Tr. 91-94, 103-06, 111-14, 118, 127-30. He did not know what his own commitment to the Tucson and Albuquerque applications was. Tr. 95-99, 170-71. Hewitt, Payne, Fields, Ozanne, and King never sat down as a group and discussed how they would finance the three ventures with their personal assets. Tr. 215. When they filed each of the three applications, they did not have a bank letter. Tr. 378-79. Mr. Hewitt was aware of all the applications, with the possible exception of Baton Rouge, but he never attempted to determine whether he or the other partners had a commitment to the other applications. Tr. 95-99, 170-71, 103-06, 111-14, 118, 127-30.

36. Mr. Payne testified that he and Mr. Fields have a commitment of $25,000 each to the Baton Rouge application, above and beyond their obligation covered by bank financing. Tr. 472. He represented that each Mid-Ohio Partner has a commitment to Tucson of $75,000, to Albuquerque of $60,000, to Beaumont of $60,000, to Roswell of $75,000 (for those with an 18% interest), and to Louisville of $150,000. Tr. 215-20.

37. Mr. King did not know what his financial commitment was to the Tucson, Albuquerque and Beaumont applications. Tr. 390-92. His testimony differs with Mr. Payne's about the Roswell application. Mr. King holds a 28% interest in the applicant and he believes that $60,000 to $70,000 of his personal assets are committed to Roswell alone. Tr. 393. Mr. King also stated that in Roswell Hewitt, Payne, Fields, and Ozanne have proportionate commitments to the Roswell applicant. Tr. 393-99, 413.

38. Mr. Hewitt represented that his financial obligation to Columbus would be covered by Mr. Ozanne. Tr. 111. Mr. Ozanne testified that his commitment to the Tucson and Albuquerque applications is only an initial capitalization requirement (Tr. 498-500) and he is not obligated to loan money to Hewitt or anyone else in any of the group's projects. Tr. 504.

39. In 1989, Mr. Hewitt revised Mid-Ohio's cost estimates. Mid-Ohio Exh. 3, at 1-2; Exh. 3, Att. B. Mr. Hewitt now estimates that it would require $495,800 to construct and operate for three months without revenues. *Id.*

40. Mr. Hewitt undertook a new cost estimate for the Mid-Ohio proposal because of the Bureau's analysis in the *HDO*. Mid-Ohio Exh. 3, at 5. He also decided to obtain a "new basis" for money to meet the costs. *Id.* He claims that by February 1989 he completed a new business plan -- 6 months after the *HDO* pointed out Mid-Ohio's errors. *Id.* He sought the assistance of Ellis Beach, a colleague of Hubert Payne, and Stan Karos, a media director at an advertising agency and a former engineer at Channel 19, Cleveland, Ohio. Tr. 139-72. In addition, Mr. Hewitt obtained a letter, dated March 8, 1989, from CVC Capital Corporation committing $495,800 to Mid-Ohio. *Id.* The loan is contingent on Mid-Ohio demonstrating that it is "a small business concern which is controlled and managed by socially and economically disadvantaged individuals as defined by the SBA [Small Business Administration] Regulations." *Id.*, at Att. A, at 1. Mr. Hewitt does not know whether Mid-Ohio's partners meet these qualifications, and he never discussed the matter with Joerg G. Klebe, the President of CVC and the person who provided Mid-Ohio with CVC's assurance. Tr. 177-80. However, Mr. Hewitt stated that he told CVC that Mid-Ohio qualified as a small business concern as defined by the SBA. Tr. 177. Mr. Hewitt does not know how SBA defines a small business concern. Tr. 178-79. Mid-Ohio did not disclose the existence of the CVC letter until June 16, 1989, when it petitioned for leave to amend its financial showing.

41. Aside from the CVC letter, Mr. Hewitt said that he is personally liable for approximately $10,000 in litigation expenses to Mid-Ohio. Tr. 100-03. He has no reason to believe that his share of litigation expenses will not be the same in other proceedings. Tr. 103.

Issue 2: Whether the applicants comply with the city grade coverage rule, Section 73.315 (a), and, if not, whether a waiver is warranted

42. Two exhibits were submitted: a Joint Engineering Exhibit (Clear Channel Exh. 3) on behalf of Mid-Ohio, Scioto, and Perkins and a separate exhibit for Radio. Radio Exh. 5. Radio supplemented its exhibit with a statement by its engineer. Radio Exh. 5A. The Joint Exhibit points out that because Columbus has an irregular shape, a jagged boundary, uneven protrusions, and numerous holes, there is no location where a Class A FM facility could completely cover Columbus with the 70 dBu contour. Clear Channel Exh. 3, at 1. Perkins will cover 71.4% of Columbus, Mid-Ohio, Scioto, and Clear Channel will cover 73.4% of Columbus. *Id.*, at 2. They will cover approximately 86% of the population. *Id.* According to Radio's engineer, John J. Mullaney, the Commission was aware when the allocation was made to Columbus that a Class A facility in communities above 300,000 population could not cover the entire city with a 70 dBu signal. Radio Exh. 5, at 4. The north-south and east-west boundaries of Columbus are 32 kilometers apart; under normal circumstances a Class A facility cannot cover a city whose diameter exceeds 27.4 kilometers. *Id.* Radio will cover 74.1% of Columbus with its 70 dBu contour and about 86% of its population. *Id.*, at 3.

Issue 3: The environmental impact of Perkins' proposal

43. After the close of the record, the Chief, Audio Services Division, found that there will be no adverse environmental impact from Perkins' proposal if measures to protect humans from nonionizing radiation are carried out. The Bureau requested that a grant to Perkins be conditioned to achieve that protection. On August 15, 1989, Perkins accepted the condition imposed by the Bureau.

COMPARATIVE FACTORS

Integration of Ownership Into Management

Mid - Ohio

44. Mid-Ohio is an Ohio limited partnership with one general partner, Joseph C. Hewitt, who owns 30% of the equity. Mid-Ohio Exh. 1. There are four limited partners with 16.25% of the equity, Hubert B. Payne, Darrell A. Fields, Dominic L. Ozanne and Val C. King, and one limited partner with 5% of the equity, Thomas W. Roberts. Mid-Ohio Exh. 1; Mid-Ohio Exh. 4, Exh. A, at 231. Joseph Hewitt will move to Columbus from Cleveland, Ohio, and become the full-time general manager. Mid-Ohio Exh. 2, at 1, 3. Mr. Hewitt will have primary and ultimate responsibility for all decisions, supervise all management personnel, and generally oversee all aspects of the station. Mid-Ohio Exh. 2, at 1. Mr. Hewitt is an African American; he works at WKYC-TV, Cleveland. Mid-Ohio Exh. 2, at 2-3. Mr. Hewitt made a claim for broadcast experience which he did not substantiate.

Scioto

45. Scioto is a limited partnership with one general partner, Paul D. Warfield, who holds 25% of the equity. Scioto Exh. 1, at 1. There are three limited partners: Ernest Green, who holds 26% of the equity, Samuel Morgan, who holds 25% of the equity, and Ben Espy, who owns 24% of the equity. *Id.* Mr. Warfield proposes to work full time, 40 hours per week, during regular business hours, as the station's general manager. Scioto Exh. 2 at 2. He will be responsible for all aspects of the management and operation of the station. *Id.*

46. Mr. Warfield lived in Columbus from 1960 to June 1964 and from January 1965 to June 1965. *Id.*, at 3. From June 1987 through October 1988 he "maintained a part-time residence in Columbus." *Id.* He currently lives in Gahanna, Ohio, which is located within the service area of Scioto's proposed station. *Id.* He has lived there since November 1, 1988. *Id.* Mr. Warfield's permanent residence at the B cutoff date was Beachwood, Ohio, near Cleveland, over 100 miles from Columbus. Tr. 653-54. From June 1987 to October 1988, Mr. Warfield worked in Dayton, Ohio. Tr. 655. During that time he spent most daytime hours working in Dayton or commuting. Tr. 655-56.

47. Over the past 16 years, Mr. Warfield has been employed by one radio station and eight television stations and television networks in positions as (1) "part-time sportcaster and radio talk show host" (17 months); (2) "part-time sports anchor" (4 months); (3) "full-time assistant sports director" (2 years); (4) "analyst for NFL football" (8 months); (5) "analyst for college football" (4 months); (6) "analyst for Cleveland Browns football" (2 months); (7) "substitute analyst for NFL football" (1 game); (8) "part-time sports announcer" for NFL (3 months); (9) "part-time sports announcer" (high school football and NFL analysis) (6 months); (10) "part-time sports announcer" (1983 to present). Scioto Exh. 2, at 5-6.

48. Since September 1987, Mr. Warfield has been on the Board of Directors of the Mid-Ohio Food Bank, which serves the needy residents of Columbus and various counties in Central Ohio. Mid-Ohio Exh. 2, at 3; Tr. 666. In this connection, he attends 7 to 8 meetings per year, each of which last about 1-1/2 to 2 hours. Tr. 664-65. He also addressed one of the group's luncheons in November 1988, where he gave a presentation which lasted 30 minutes. Scioto Exh. 2, at 5; Tr. 674.

49. Since March 1988, Mr. Warfield has been on the Board of Directors of the Columbus Youth Corps, which promotes personal and scholastic achievement of Columbus youth. Exh. 2, at 3. He has attended a total of 2 or 3 meetings, each of which were about 2 hours in duration. Tr. 668.

50. Since April 1988, Mr. Warfield has been a member of the Columbus Chapter of the National Football League Alumni Association. Exh. 2, at 4. He is not a member of the Board of Directors. Tr. 670. His participation consisted of attending a one day golf outing. Tr. 669.

51. Mr. Warfield served on the selection committee for the Ohio State Alumni Association's Prestigious Alumni Citizen Awards in 1988, and he twice appeared as a speaker at its events. Scioto Exh. 2, at 4; Tr. 671. Mr. Warfield has been a member of the Ohio University Black Alumni Association since 1986. Scioto Exh. 2, at 4. He has not spent any time with this group. Tr. 671-72. He is not currently on the Board of Directors. Tr. 671. In December 1988, Mr. Warfield spent a "couple of hours" (Tr. 672), participating in the United Negro College Fund's fund raising telethon. Scioto Exh. 2, at 4. This entity raises funds to assist African American students

throughout the country. Tr. 672. In April 1989, Mr. Warfield narrated a tribute to Paul Robeson at the Martin Luther King Center in Columbus. Scioto Exh. 2, at 4.

52. In February 1989, Mr. Warfield participated in a fund raising event for the Heinzerling Foundation, which operates a residential treatment center for handicapped children in Columbus. Scioto Exh. 2, at 4. Mr. Warfield's participation in this event consisted of being a roaster for Michigan football coach Bo Schembeckler. Tr. 673. In March 1981, Mr. Warfield was a featured speaker for the Merry Makers, an organization which provides scholarship funds for minority students in Columbus. Scioto Exh. 2, at 4. In 1985, Mr. Warfield spoke at the "football appreciation banquet" for Watterson High School in Columbus. Scioto Exh. 2, at 5.

53. Since September 1988, Mr. Warfield's family has been a member of the Columbus Chapter of Jack and Jill, Inc., an organization which promotes educational and cultural development among black families and raises funds for similar organizations. Scioto Exh. 2, at 5. Mr. Warfield is not a member of Jack and Jill's Board of Directors and has devoted a total of 4 1/2 hours to this organization. Tr. 674- 75. Mr. Warfield has been a member of the Columbus Association for the Performing Arts since November 1988, but he has spent no time at all on its activities. Scioto Exh.2, at 5; Tr. 675. Mr. Warfield is an African American. Scioto Exh. 2, at 3.

Radio

54. Radio is an Ohio limited partnership. Radio Exh. 1. There is one general partner, Karen Murray, who holds a 15% partnership interest. *Id.*, Att. A, at 4. There are two limited partners, McFadden Communications Corporation (MCC), which holds an 80% partnership interest, and William Book Roth, who holds a 5% partnership interest. Radio Exh. 1, Att. A, at 4. McFadden Communication Corporation's chairman is Douglas McFadden and he owns about 55% of MCC's stock. Tr. 1432.

55. If Radio's application is granted, Ms. Murray plans to move from Germantown, Tennessee, to Columbus, Ohio to devote full- time, 40 hours per week, to the Columbus FM station. Radio Exh. 2, at 1; Tr. 684. She proposes to be the station's general manager. *Id.*[1]

56. Ms. Murray first learned of the frequency availability in Columbus from Mr. Roth, who is affiliated with MCC in another FCC application for an FM radio station in Fresno, California.[2] Tr. 701-04. McFadden, Evans & Sill, the law firm in which Douglas McFadden is a name partner, represented Radio in this proceeding through the hearing. Ms. Murray learned of Mr. McFadden through Mr. Roth. Tr. 703-05, 708. (Ms. Murray does not know how Messrs. Roth and McFadden became acquainted. Tr. 706.) Ms. Murray wrote Mr. McFadden a letter, dated March 7, 1987, seeking his involvement in the Columbus application. Tr. 708-09. In the letter Ms. Murray appealed to Mr. McFadden by stating that "I feel that Mr. Roth and I can create a successful radio station that would provide the service the Columbus residents need and desire." Scioto Exh. 4; Tr. 715. Before she wrote to Mr. McFadden, Ms. Murray asked Mr. Roth to contact him and see if he would be interested. Mr. Roth did that and told her to write to Mr. McFadden and to invite him to come to Columbus for a meeting. Tr. 708.

57. Mr. McFadden responded by letter dated March 11, 1987, on McFadden, Evans & Sill stationery. Scioto Exh. 5; Tr. 722. Despite the fact that Mr. McFadden had never inquired about or seen Ms. Murray's financial records, he stated that he was "impressed with the opportunity" and enclosed a limited partnership agreement for Ms. Murray to sign. Tr.723-25, 1510. The agreement had the name of the partnership and the equity percentages of 80% for MCC, 5% for Mr. Roth and 15% for Ms. Murray already filled in; Mr. McFadden had never discussed the ownership shares with Ms. Murray. Tr. 724-26. Ms. Murray signed the partnership agreement Mr. McFadden sent her without making any changes and without inquiring as to how the equity percentages were reached. Tr. 725, 732-33.

58. Ms. Murray and Messrs. Roth and McFadden met at the Columbus airport on March 14, 1987 to discuss the partnership. Tr. 727. Ms. Murray testified that she never actually spoke to Mr. McFadden until the March 14 meeting. Tr. 712. Mr. McFadden testified that he had several conversations with Ms. Murray prior to the meeting. Tr. 1509. Ms. Murray has never inquired about the organization of MCC and relied on Mr. Roth's verbal assurances that Mr. Roth and MCC could meet their financial obligations to the partnership. Tr. 728-32. Ms. Murray obtained Radio's initial bank letter from Bank Ohio. Scioto Exh. 12; Tr. 807. After Mr. Shoreman, Radio's counsel, determined the bank letter was defective (Tr. 809, 812), Mr. McFadden obtained a bank letter from Bank One. Scioto Exh. 13; Tr. 811. Ms. Murray had no prior business relationship with Bank One (Tr. 811) and did not provide any financial information to Bank One. Tr. 812. The bank letter is addressed "Dear Sir." Scioto Exh. 13.

59. Ms. Murray hired John M. Shoreman, an attorney at McFadden, Evans & Sill, at the suggestion of Mr. Roth, without knowing what his hourly rates would be. Tr. 731, 754. Ms. Murray also hired the engineer for Radio, without inquiring about or knowing his rates, solely on the basis of the recommendation of Mr. Shoreman. Tr. 804. Mr. Shoreman is also legal counsel to the Fresno partnership, in which Mr. Roth is a partner and MCC is the sole limited partner with an 85% equity interest. Tr. 731, 848. The Fresno partnership has a deferred billing arrangement with McFadden, Evans & Sill. Tr. 850-51.

60. Radio has a deferred billing arrangement with McFadden Evans & Sill, and Mr. McFadden is aware of this procedure. Tr. 745, 773, 775-76. This arrangement came about through an oral understanding, and is not contained in any writing. Tr. 745. The arrangment is that Radio will not pay its legal bills (and other expenses) until the proceeding is terminated. *Id.* McFadden Evans & Sill represents several other applicants before the FCC, and the vast majority of them do not have deferred billing arrangements with the firm. Tr. 1443, 1467, 1481-82, 1493. Mr. McFadden claims that he does not know the nature of Radio's billing arrangement with his firm. Tr. 1468. He concedes he does, however, receive information about the status of the accounts of his law firm's clients. Tr. 1456-57.

61. MCC does business out of the law offices of McFadden Evans & Sill. Tr. 1438. When Ms. Murray writes to Mr. McFadden at MCC, she sends the letters to the Washington, D.C. address of McFadden, Evans & Sill. Tr. 813, 1534. Letters from Mr. McFadden of MCC to Ms. Murray are written on McFadden, Evans & Sill's stationery. *See, e. g.*, Tr. 722. Ms. Murray could not recall ever

having seen MCC stationery. Tr. 823. Mr. McFadden's secretary, an employee of McFadden, Evans & Sill, performs work for MCC. Tr. 1515. MCC does not have any employees. Tr. 514-15.

62. Under the terms of Radio's Limited Partnership Agreement, the limited partners are only obligated to contribute up to $50,000 for pre-grant expenses. Radio Exh. 1, Att. 1 at 3; Tr. 755-57. If the application process requires more than $50,000, the limited partners can voluntarily contribute additional funds; if they do not, Ms. Murray is responsible for financing the additional costs. Tr. 756-57.

63. Ms. Murray has paid only $1,500 to Radio to date, which is less than her 15% partnership share. Tr. 786-89, 834-35. Mr. Roth has not made any contribution to the partnership to date, although he was required under the partnership agreement to advance $3,000 as an initial contribution. Tr. 763-64, 855-56. Ms. Murray has not made any capital calls to Mr. Roth, even though, under the partnership agreement, she has the right to make calls to the limited partners in accordance with their equity percentages. Tr. 764-65. Ms. Murray has made capital calls to MCC or McFadden for the hearing fee, publication fee, filing fee and engineering expenses. Tr. 765-69. McFadden has paid virtually all of these expenses, and MCC/McFadden's contribution to Radio exceeds its 80% pro rata share. *Id.* Mr. McFadden believes that he or MCC have contributed $10,000 to $15,000. Tr. 1527. Mr. McFadden has never seen Ms. Murray's financial statements, nor inquired about her financial capabilities. Tr. 1521. Mr. McFadden is not concerned that Mr. Roth and Ms. Murray have failed to meet their pro rata shares of Radio's costs. Tr. 1487, 1521-23.

64. On several occasions during the hearing Douglas McFadden invoked the attorney-client privilege and refused to comply with the presiding officer's directives to respond to the questions. Tr. 1445-47, 1450-51, 1453-54, 1467-68, 1472. Mr. McFadden also displayed a hostile and contemptuous attitude toward the presiding officer, and was an "obstreperrous", "belligerent", and totally uncooperative witness. E.g., Tr. 1445-47, 1450-51, 1453-54.

65. Ms. Murray lived in the Columbus service area from August 1985 to May 1988. Radio Exh. 2, at 1. While living in the area, Ms. Murray was a member of the International Association of Business Communicators and spent about 30 to 40 hours on its activities during the year. As a member of the organization from 1985 to 1987, she devoted about 15 to 20 hours to it each year. Radio Exh. 2, at 2; Tr. 815. She also was a member of the local chapter of the Notre Dame Club (1985-88), twice worked at Grandview Heights Friend of the Library Booksale (1986-87, devoting about six hours each year), and twice volunteered for the WOSU public television auction (1985-86, devoting about five or six hours each year). Radio Exh. 2; Tr. 816-17.

66. From 1980 to 1985, Ms. Murray worked at radio and television stations in Iowa and Indiana as an on-air personality, public service director and news reporter. Radio Exh. 2, at 4. Ms. Murray is female.

Clear Channel

67. Clear Channel is a Texas corporation where stock is publicly traded on the American stock exchange. Clear Channel Exh. 1, at 1. One stockholder, B. J. McCombs, owns 33.5% of the shares and L. Lowry Mays owns 34.5% of the shares. It does not propose integration of ownership into management. Clear Channel Exh. 1, at 1.

Horace E. Perkins

68. Mr. Perkins is an individual applicant. Perkins Exh. 1, at 1. He proposes to work full time, 40 hours per week, as the general manager and sales manager of the station. Perkins Exh. 1, at 1. He will oversee all aspects of the station's operation. *Id.* Perkins lives in Columbus and has for the last 26 years. *Id.* He has worked at station WVKO(AM) in Columbus since March 1963. *Id.* Mr. Perkins is an African American. *Id.*

Diversification of Control of the Media of Mass Communications

Mid - Ohio

69. Neither Mid-Ohio nor its general partner, Joseph Hewitt, has an interest in the medium of mass communications. Mid-Ohio Exh. 5. Hubert B. Payne, a limited partner holds 12% of the stock in Channel 19, Inc., the licensee of station WOIO-TV, Shaker Heights, Ohio; and 400 shares of the Tribune Company, a multiple licensee. *Id.* The Tribune shares constitute less than 1% of the stock of the Tribune Company. *Id.*

Scioto

70. Neither Scioto, its general partner, nor any of its limited partners have an interest in a medium of mass communications. Scioto Exh. 1.

Radio

71. Radio and its general partner, Karen Murray, do not have an ownership interest in an existing medium of mass communications. Radio Exh. 3. William Roth was the general manager, vice president and a 5% owner of Quad Cities d/b/a KLIO/K-Lite, the licensee of station KLIO-FM, Clinton, Iowa at the B cutoff date in this proceeding. Radio Exh. 3; Tr. 844-45. Mr. Roth is presently the general manager of KLIO-FM, which is now licensed to Arrow Communications. Tr. 844-45.

Clear Channel

72. Clear Channel is the licensee of the following radio stations: WOAI(AM) and KAJA-FM, San Antonio, Texas; KPEZ-FM, Austin, Texas; KALO(AM) and KHYS-FM, Port Arthur, Texas; KTAM(AM) and KORA-FM, Bryan, Texas; KAKC(AM) and KMOD-FM, Tulsa, Oklahoma; KTOK(AM) and KJYO- FM, Oklahoma City, Oklahoma; WELI(AM), New Haven, Connecticut; WQUE(AM) and WQUE-FM, New Orleans, Louisiana; and WHAS(AM) and WAMZ-FM, Louisville, Kentucky. Clear Channel Exh. 2.

73. Clear Channel, through its wholly-owned subsidiary Clear Channel Television, Inc., is the licensee of the following television stations: WPMI-TV, Mobile, Alabama and KDTU-TV, Tucson, Arizona. *Id.* Clear Channel Television, Inc. is the proposed assignee of Station KOKI-TV, Tulsa, Oklahoma (*Id.*) and Station WAWS-TV, Jacksonville, Florida.

74. Clear Channel is the licensee of a low power television station ("LPTV") in College Station, Texas (K28AK). *Id.* It has been awarded construction permits for new

LPTV stations in Corpus Christi (K22BH), San Antonio (Channel 17), and Waco (K62CY), Texas, and Oklahoma City (K69EK), Oklahoma. *Id.* It has filed an application (File No. BPTTL-880624SH) for a new LPTV station in Temple, Texas (Channel 16). *Id.*

75. Clear Channel is the owner and operator of the Oklahoma News Network, a satellite-delivered (wired) network serving stations primarily in Oklahoma. *Id.* KTOK, KMOD, and KAKC are affiliated with the Oklahoma News Network. *Id.*

76. L. Lowry Mays, President and Chief Executive Officer, a Director and 34.5% shareholder in Clear Channel, is a member of the Board of Regents of Texas A & M University, licensee of KAMU-TV and KAMU-FM (Educational), College Station, Texas. *Id.*

77. B. J. McCombs, a Director and 33.5% shareholder in Clear Channel, owns 30 percent of San Antonio Channel 2, Inc., the permittee of LPTV station KO2MX, San Antonio, Texas, and is an 80 percent limited partner of Fredericksburg Channel 2, and an applicant (File No. BPCT- 870212KP) for TV Channel 2, Fredericksburg, Texas. *Id.* Also, B. J. McCombs' daughters, Marcia McCombs Shields, Connier McCombs McNab, and Lynda McCombs Rubie, together own an additional 30 percent of San Antonio Channel 2, Inc. *Id.*

Perkins

78. Perkins has no interest in a medium of mass communications. Perkins Exh. 1.

Auxiliary Power

79. Mid-Ohio will install an auxiliary power supply at both its transmitter and studio locations. Mid-Ohio Exh. 6. Scioto will also. Scioto Exh. 3. Radio will install an auxiliary power system. Radio Exh. 4. Perkins will install an auxiliary power generator. Perkins Exh. 2.

CONCLUSIONS

Mid - Ohio's Financial Qualifications

80. Mid-Ohio general partner Joseph Hewitt certified to the Commission that Mid-Ohio is financially qualified. When the Mass Media Bureau tested Mr. Hewitt's certification, it concluded that Mid-Ohio had not established a basis for or the validity of its cost estimates. The Bureau found that Mid-Ohio, in mid-May 1987, used estimates that had been prepared in 1984 for Upper Arlington, Ohio, a suburb of Columbus. Mid-Ohio failed to explain why the estimates prepared three years earlier were valid for its proposal. It also found that Mid-Ohio had not included any amount for installation of equipment or for the first three months' operating expenses. In addition, while Mid-Ohio patterned its proposal after that made for Upper Arlington, its cost estimate of $351,000 was only half of the $662,183 projected for Upper Arlington.

81. The Bureau also found that although Mid-Ohio represented that its partners would finance the proposal in proportion to their shares in the partnership, the partners had not supplied documentary support for their promises. When the Bureau tested general partner Hewitt's obligation to provide $196,855, it found he had a negative liquid net worth. Mr. Hewitt's additional claim that the other partners would lend him money was found by the Bureau to be unsupported. Although the Bureau did not test the financial ability of the other partners to make their contributions, it did find that the the contributing partners would only provide 95% of the needed equity which left Mid-Ohio 5% or $32,809 short of meeting its estimated costs of construction and operation.

82. Mr. Hewitt concedes that he had made a number of errors when he determined the applicant's financial qualifications. He claims that he misread the Upper Arlington proposal. First he used the amount listed as equity in Upper Arlington as Mid-Ohio's proposed operating costs. He also used the amount proposed for bank debt in Upper Arlington as Mid-Ohio's figure for total equipment expenditures. In fact, he admitted that if he had used the proper figures, Mid-Ohio would have needed $513,000. Mr. Hewitt's explanation for this bizarre confusion of numbers is implausible. The cost and revenue estimates of the Upper Arlington FM proposal are clearly labeled and, when Mr. Hewitt was tested on his ability to identify how much cash would be required and the first quarter estimated cost of operations in the Upper Arlington proposal, he was able to do so with little effort and no assistance. All items in the Upper Arlington proposal were clearly labeled and easy to read.

83. As for the other questions raised by the Bureau, Mr. Hewitt admitted that he did not adjust the dated material prepared for Upper Arlington to coincide with 1987 prices. He also did not consider what it would cost to install the equipment. His facile explanation is that he assumed that because the equipment is $163,000, that amount must include installation. Again, as the Bureau pointed out, the Upper Arlington analysis specifically indicated that the $163,000 did not include installation. Mr. Hewitt's testimony indicates that he gave no thought to what he was doing. While he claims that he followed the Upper Arlington estimates, there is no reasoned explanation for how he obtained his estimates, or for that matter, that he performed any analysis at all. His excuse of ineptness is all the more unbelievable because he claims that he had the instructions to Form 301 for guidance, the Commission's most recent public notice on certification, the assistance of counsel, and familiarity with broadcasting as a station employee. While he admits that he did not spend much time on Mid-Ohio's estimated costs, that claim is an exaggeration. There is no reliable evidence or documentation that he spent any time estimating costs of operation and construction. The only documents that Mid-Ohio was able to produce had nothing at all to do with Mid-Ohio's proposal. It was prepared three years before for another community, apparently by persons who are not associated with Mid-Ohio. Mid-Ohio's certification that it had determined the cost of construction and operation for three months is not supported with reliable evidence. Mid-Ohio provided no contemporaneous records to show that it undertook any cost analysis before it certified and it did not produce any testimony from anyone who could have corroborated Mr. Hewitt's explanation. Mr. Hewitt admits he knew what he needed to do. The record reflects, however, that, although he did not analyze what it would cost to develop Mid-Ohio's proposal, he represented to the Commission that he had made the required determination.

84. There is also no reliable evidence that Mr. Hewitt had net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months without revenue. There is no claim by Mid-Ohio that it had net liquid assets on hand. But it did

claim that its partners had net liquid assets available to provide the $513,000 that was estimated to be needed in Upper Arlington, or for that matter the $351,000 that Mr. Hewitt claims he determined would be needed to finance the station if Mid-Ohio relied on the Upper Arlington analysis.

85. Mr. Hewitt has not established that he had any liquid assets at the time of certification. His secondary claim, that Hubert Payne, a limited partner, would provide the money, if he could not, is not based on any agreement and it is not known whether Mr. Payne has sufficient liquid assets to provide Mr. Hewitt with the amount he needs. Mr. Payne claims his 10% interest in a privately held television station in Cleveland is liquid because he has a put agreement. Mr. Payne has not demonstrated that that asset is liquid or, if it is, there will be enough money to meet all his promises to provide financing for various applications and, in addition, to lend money to Mr. Hewitt and to Val King, another limited partner. Mr. Payne estimates that he has $180,000 in net liquid assets. He has a commitment of $25.000 to a Baton Rouge proposal, $75,000 to an Albuquerque proposal, $60,000 to a Beaumont proposal and so on. The hearing testimony does not establish that Mr. Payne has sufficient liquid assets, nor does it explain what claims there were on those assets at the time of certification. It appears unlikely that Mr. Payne could meet his own promises at the time of certification to Mid- Ohio of nearly $100.000 and lend money to other owners to meet their obligations.

86. Dominic Ozanne relies on a line of credit which has been extended by the AmeriTrust Bank to a construction company which he heads and owns 25% of. Mr. Ozanne has not offered any assurance that the line of credit could be used for this proposal which is unrelated to his construction business. In addition. Mr. Ozanne has not provided an accurate account of how much money he has committed to other applications. Darrell Fields, another limited partner, claims he has the right to a $40.000 certificate of deposit. But that certificate is in his spouse's name with her father acting as trustee. There is no written agreement that he can use that money. Mr. Fields, like the other Mid-Ohio partners, has not demonstrated that, if the $40,000 were available, he does not have other commitments for the money. Val King, a limited partner, relies on a home equity loan to obtain his share. That share, like all limited partners, was over $100,000 at the time of certification and he only had $17,000 in equity in his house. He has provided no statement from any bank about how much he could borrow on his house.

87. Mr. Hewitt relied on his belief that the other partners could provide the needed funds. The record reflects that there is no basis for that belief and that, at the time of certification, Mr. Hewitt did not determine whether Mid-Ohio had available net liquid assets to finance his proposal. Mr. Hewitt concedes that he knew what he needed to do to certify. He certified, however, without the necessary assurance. Moreover, if he had undertaken the necessary analysis, he could not have certified that Mid-Ohio was financially qualified. There is no doubt remaining after this hearing that Mr. Hewitt's representations about Mid-Ohio's financial qualifications are unreliable and untruthful. Mid-Ohio is not the sort of applicant that the Commission can rely on to comply with regulatory requirements; it is not qualified to be compared with the other applicants.

The City Coverage Issue

88. None of the applicants are able to provide 80% coverage of the entire city of Columbus, although each will cover at least 71.4% of the city. The Mass Media Bureau has supported waiving the city coverage rule, §73.315(a), because the area of the city is too great to permit coverage of 3.16 mV/m with a Class A FM channel. The failure to cover the entire city is ameliorated, the Bureau believes, by the fact that the applicants will cover 85% or more of the population. A waiver will be granted to every applicant.

The Environmental Impact of Perkins' Proposal

89. Perkins has agreed to a condition requested by the Bureau to comply with environmental regulations and, therefore, the issue is resolved.

The Comparative Issue

Promise of owners to work full time at the station in management positions.

90. Because Mid-Ohio is unqualified, only four applicants are entitled to comparison: Scioto, Radio, Clear Channel, and Perkins. Clear Channel does not propose that any of its owners will work at the station; therefore, only Scioto, Radio and Perkins have competitive proposals.

Scioto

91. Scioto's general partner, Paul D. Warfield, proposes to work full time, 40 hours per week, as the station's general manager. Scioto is, therefore, entitled to 100% credit for its proposal to combine ownership control with management. Two arguments are asserted for discounting Mr. Warfield's promise. Mid-Ohio argues that Mr. Warfield will not spend 40 hours per week at the station because he intends to operate a Burger King franchise. Mr. Warfield applied for a franchise from Burger King, in 1986, before Scioto filed this application. He did so only under the condition that his partner would undertake the day-to-day management. Tr. 675-76. When his partner decided not to proceed with the application, Mr. Warfield indicated he was not interested either. They sent a letter to Burger King in which they explained that they did not intend to pursue the venture together. Tr. 551. Mr. Warfield does not consider himself an applicant for the franchise. Tr. 678-79. Mid-Ohio also urges that Mr. Warfield is discussing employment with the Mid-America Football Conference. Mr. Warfield claims he has shown minimal interest and there has been no meeting of the minds. Tr. 643-44.

92. Mr. Warfield, Mid-Ohio also urges, has not demonstrated that he will leave or curtail his current employment. He currently works 20 hours per week as the director of marketing and sales for Ernie Green Industries, a manufacturing firm. Tr. 637. He is also president and 51% owner of Warfield & Morgan Associates, a temporary services contractor, to which he devotes an additional 20 hours per week. Mr. Warfield testified that he will quit his employment with Ernie Green Industries (Tr. 662) and that he will devote considerably less than 20 hours per week to Warfield & Morgan Associates. Tr. 548. Mr. Warfield stated he would be able to reduce his hours because his 49% partner had previously managed the business on his own and it is Mr. Warfield's intention to

turn over the day-to-day business operations to his partner. Tr. 548-49. Mr. Warfield also stated that his wife would become active in the company. Tr. 549 The record does not support Mid-Ohio's claim that Mr. Warfield will not be available to work 40 hours per week.

93. Radio claims that Scioto's counsel is in control of the applicant and that Mr. Warfield is not. Radio has not requested a real-party-in-interest issue. Radio claims that Scioto's counsel controls because he advised Scioto to organize as a partnership; prepared the partnership agreement; recommended an engineer; arranged to have the partnership agreement filed in Ohio; and recommended that Scioto propose auxiliary generators. Scioto points out that Mr. Warfield stated that he told counsel to organize the applicant in order to insure that he would be in charge and it was then that counsel suggested a limited partnership. Tr. 525-26. Mr. Warfield asked counsel for help in obtaining an engineer only after he had been unsuccessful in finding one himself. Tr. 527. Scioto points out that Mr. Warfield did undertake some of the organizational tasks. He established the public inspection file and arranged for publication of notice. Tr. 584-85. In addition, Scioto responds that Mr. Warfield contacted the FCC to find out how to pursue a broadcast application (Tr. 519), identified and retained counsel, sought an engineer, recruited Scioto's limited partners, prepared and reviewed the application and obtained a transmitter site. Tr. 522-33; 544. Given these facts, Radio has not demonstrated that Mr. Warfield will not exercise control over the partnership if a grant is made.

Radio

94. Radio's only general partner, Karen Murray, proposes to work full time, 40 hours per week, at the station as the general manager. Ms. Murray holds only 15% of the equity; there are two limited partners, McFadden Communications Corporation, which holds 80% of the equity, and William Roth, who holds 5% of the equity. The opposing applicants all argue that Ms. Murray will not be in complete control of the applicant and some urge that she will not exercise any control.

95. The opposing applicants claim Ms. Murray lacks control because she has a small interest, she failed to organize the applicant, she has not contributed her equitable share of the expenses, and that Douglas McFadden, who controls McFadden Communications, has essentially directed the course of the applicant. Radio has no operational experience; therefore, it is largely its organizational activities and its participation in this hearing that offer a view of how the partnership operates. General partner Murray learned about the frequency from Mr. Roth. He is pursuing an application for Fresno, California with Mr. McFadden's company, McFadden Communications, and both applicants have had as their counsel John M. Shoreman, a lawyer in McFadden, Evans & Sill. Mr. Roth had worked at a broadcast station with Ms. Murray and he suggested that she ask Mr. McFadden if he would agree to join in the proposal. The three partners met at the airport in Columbus to discuss the partnership. Preceding that meeting, however, Mr. McFadden provided a partnership agreement which governs the partnership and identifies the partners' ownership. Ms. Murray stated that she accepted the partnership interest Mr. McFadden offered. Throughout the proceeding, apparently after Mr. McFadden organized the applicant, an associate in Mr. McFadden's law firm, McFadden, Evans & Sill, represented Radio. It is Mr. McFadden's claim that the firm does not consult him about Radio's proposal. However, at the same time, Radio has not been expected to pay any fees to the firm and has paid none.

96. It is Radio's claim that Ms. Murray acted independently and that she was not directed by Mr. McFadden and Mr. Roth. She claims she hired Mr. Shoreman and the applicant's engineer. She nominally did. However, she selected Mr. Shoreman at Mr. Roth's suggestion and failed to even find out what he would charge per hour. The engineer she hired was suggested by Mr. Shoreman and again she did not inquire about his rates. Moreover, even with regard to these very perfunctory actions, there is only Ms. Murray's word that she carried them out. While it appears that she did, the record indicates she was doing what someone else suggested.

97. From the few decisions that were made in organizing the applicant and preparing the application, it is not possible to conclude that Ms. Murray would not eventually exercise control. It is not unusual for a limited partner such as Mr. McFadden, who is a lawyer, to provide a partnership agreement. Moreover, Mr. McFadden or his communications company has participated in numerous broadcast applications. Thus, the fact that he was knowledgeable about the method for organizing and pursuing a proposal before the Commission was to be expected. Whether he will exercise authority over the broadcast operations is not necessarily evident by those activities. It is apparent, however, that Mr. McFadden has had a significant impact on how the applicant meets its financial obligations. While it might be expected that a limited partner would finance legal and filing fees, Mr. McFadden's law firm has not collected any fees. Ms. Murray, who it might be expected, as the general partner, would at least know how that arrangement came about, did not know that or even what the firm's charge would be. While she has a financial obligation for partnership expenses, thus far she has not directly provided the partnership with her share. She stated that she paid various expenses that she incurred and which she also deducted from her personal income tax. Her testimony on this point is unreliable. Her demeanor during questioning was agitated and defensive. She made different claims about the money she has contributed. *Compare*, Tr. 786-89, 834-35. When she was asked for details, she refused to answer and would say only that she had agreed to tell the truth. The only objective record evidence establishes that those bills that have been paid were paid by McFadden Communications.

98. While Ms. Murray testified on the applicant's behalf, at all other times the knowledge and resources of the limited partner, the limited partner's owner, or the limited partner's law firm have perfected Radio's proposal.

99. Perkins argues that Ms. Murray's failure to contribute her financial share places her in a vulnerable position. According to the partnership agreement, the limited partners need only contribute $50,000. Expenses beyond that amount would, Perkins argues, become Ms. Murray's obligation. That "threat," Perkins maintains, makes Ms. Murray vulnerable to the limited partners' directions. That may be the case, but there is no evidence to support the conclusion Perkins urges. It may be that Ms. Murray could provide the needed financing. Perkins claims that McFadden and his law firm have been carrying Ms. Murray's capital share and the threat of their demand for her share also makes her subject to their

control. While the possibility exists, there is, as has just been pointed out, no evidence that she could not provide her share if she needs to do so.

100. Mid-Ohio urges that when a lawyer takes an equity interest and simultaneously performs legal services, the lawyer cannot be considered a passive investor. Mr. McFadden claims that once his firm was hired, he was not consulted about the applicant's legal affairs and he did not personally provide legal assistance. This separation was specifically undertaken to avoid a finding that he was active in the applicant's affairs to meet the principle enunciated in *Doylan Forney*, 3 FCC Rcd 6330, 6332 (Review Bd. 1988). There is no evidence that after Mr. McFadden organized the applicant that he made any legal decisions, except for deciding to pay money owed by the applicant. While Mr. McFadden refused to answer various questions and was uncooperative, there is no reason to doubt that he did not provide legal services to the applicant, and that only his law firm provided the services without consulting him. Mr. McFadden acted like the lawyers Sanchez and Jenkins in *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988). There the Commission found that Sanchez and Jenkins' role in organizing the applicant and initially providing legal services did not alter their passive status. The Commission observed that neither Sanchez nor Jenkins had a history of broadcast operation. There is no evidence that Mr. McFadden has any interest in operating the station. Ms. Murray lived in Columbus at the time Radio made its proposal and she had lived there since 1985, for a period of two years and nine months. And from 1980 to 1985 she worked at broadcast stations. Shaky as Ms. Murray's role has been in organizing and pursuing the proposal, it cannot be concluded that Ms. Murray would not work full time, 40 hours per week, managing the station. She is entitled to some integration credit. However, it is unestablished that Ms. Murray will be the station's general manager since the partnership agreement provides that her management role will be determined by contract with the partnership after a grant is made. The partnership agreement is silent about who will make that determination and Ms. Murray did not know who would either.

Clear Channel

101. Clear Channel's owners do not propose managing the station.

Perkins

102. Horace Perkins will work full time, 40 hours per week, as the general manager and sales manager at the station. Communications argues that because Mr. Perkins intends to sell advertising he cannot be fully credited with a management position. Mr. Perkins, however, as he points out in his reply, made clear that he would primarily manage but because of his long association with sales in Columbus, he would be unable to avoid longtime advertisers. There is no indication that he will not spend most of his time managing the station. *See Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6128 (Review Bd. 1987).

Conclusion

103. Scioto, Radio, and Perkins all present nearly equal quantitative proposals. Radio's general partner claims that she will be the general manager, as does the general partner in Scioto, Paul Warfield, and the individual applicant, Horace Perkins. But Radio's partnership agreement specifically provides that the management role of the general partner, Karen Murray, will be decided after a grant is made and will be governed by a contract to be written at that time. Moreover, the partnership agreement does not indicate, and Ms. Murray does not know, who will make that determination. That uncertainty, along with her passive role in organizing and pursuing a grant of the application, leaves uncertain and unestablished whether she will be the general manager, as she asserts, and whether she will even make the decision about what role she will have. It is evident that Scioto's general partner, Paul Warfield, and Horace Perkins will definitely act as the general manager of the station. There is no question about their policy making functions or their role in management. Paul Warfield and Horace Perkins will each occupy the general manager's position, the most important policy position. On comparative quantitative grounds, Scioto and Perkins are to be preferred over Radio.

104. Each of the applicants also has qualitative attributes that enhance their quantitative proposals. Mr. Warfield, Ms. Murray, and Mr. Perkins have all lived in Columbus or the area. Mr. Perkins has lived in Columbus continuously since 1963. Neither Mr. Warfield nor Ms. Murray have had a long association with the community. Ms. Murray lived in the Columbus service area for two years and nine months from August 1985 to May 1988. She would move back if a grant were made. Mr. Warfield was a college student in Columbus for a little over four years beginning in 1960. He did not live there again until after Scioto filed its application in 1987. From June 1987 to October 1988, he lived part-time in the Columbus area. And since November 1988 he has made his full-time home in Gahanna, Ohio which is within the service area. There is no doubt that Mr. Perkins presents a longtime continuous association with Columbus and Scioto and Radio do not. Nevertheless, Paul Warfield has exhibited an active participation in civic affairs during the time he has been associated with Columbus and Karen Murray has also demonstrated an interest in the community by participating in local activities during her short residence. Mr. Perkins does not have any record of civic participation or any other activity which would indicate a knowledge of and interest in the welfare of the community. However, the Commission believes that local residency by itself "indicates a likelihood of continuing knowledge of changing local interests and needs." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 396 (1965). It cannot be concluded that Mr. Warfield and Ms. Murray's local activities outweigh Mr. Perkins' longtime, continuous residence in Columbus. Both Mr. Perkins and Mr. Warfield receive a preference because they are African Americans and Ms. Murray receives a lesser preference because she is female.

105. Ms. Murray, Mr. Warfield, and Mr. Perkins all have broadcast experience but on this criterion Mr. Perkins also is to be preferred because his experience is full time, continuous and of long duration. Mr. Perkins has worked at a radio station in Columbus since 1963. Ms. Murray worked at broadcast stations from 1980 to 1985. After 1985, she did not work as a broadcaster. Mr. Warfield has worked in broadcasting over a 16 year period but during those years he worked only a few months each year on a part-time basis. Mr. Perkins is to be preferred for his broadcast experience over Scioto and Radio. Over-

all, Mr. Perkins is to be preferred over Scioto and Radio because of his longtime residence in the community, his longtime broadcast experience and his proposal to work full time as the general manager. He is also preferred over Radio because he is an African American.

Diversification of control of the media of mass communications

106. Perkins, Scioto and Radio and their owners have no attributable media interests. Communication has substantial interests in the mass media and is least preferred. Perkins, Scioto and Radio, because they have no media interests are equally preferred.

Auxiliary Power

107. All the applicants but Communications will install an auxiliary power supply.

108. Perkins is to be preferred over the other applicants because of his superior integration proposal.

ACCORDINGLY, IT IS ORDERED that the petition to reopen the record, filed September 11, 1989 by Mid-Ohio Radio Limited IS DENIED.

IT IS FURTHER ORDERED that the motion for disqualification of counsel for Horace E. Perkins, filed September 11, 1989 by Mid-Ohio Radio Limited IS DENIED.

IT IS FURTHER ORDERED that the petitions to enlarge issues against Clear Channel Communications, Inc. and Horace E. Perkins, filed September 11, 1989 by Mid-Ohio Radio Limited ARE DENIED.

IT IS FURTHER ORDERED that the requests for extension of time (1) and (2), filed September 13, 1989 by Horace E. Perkins ARE GRANTED.

IT IS FURTHER ORDERED that the request for extension of time, filed September 13, 1989 by Clear Channel Communications, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the motions for protective order, filed September 26, 1989 by Clear Channel Communications, Inc. and Horace E. Perkins ARE DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the petition for leave to amend, filed October 24, 1989 by Clear Channel Communications, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend and amendment accepting condition, filed August 15, 1989 by Horace E. Perkins IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition to reopen the record and receive additional testimony of Karen Murray, filed September 27, 1989 by Mid-Ohio Radio Limited IS DENIED.

IT IS FURTHER ORDERED that the applications of Mid-Ohio/Capitol Communications Limited Partnership (File No. BPH- 870515MK), Scioto Broadcasters, Limited Partnership (File No. BPH-870514MU), Mid-Ohio Radio Limited (File No. BPH-870515NM), Clear Channel Communications, Inc. (File No. BPH-870515NN) ARE DENIED and the application of Horace E. Perkins (File No. BPH-870515NP) for a construction permit for a new FM station on Channel 298A in Columbus, Ohio IS GRANTED subject to the following condition:

Before test authority is authorized by the Commission permittee shall submit documentation of compliance with this special operating condition along with the Form 302, application for license, and the request for PROGRAM TEST AUTHORITY. The permittee shall, upon completion of construction and during the equipment test period, make proper RF field strength measurements throughout the tower area to determine if there are any areas that exceed the ANSI, EIP and FCC specified guidelines for human exposure to radio frequency radiation. If necessary, a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio frequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Any areas within the fence found to exceed the recommended guidelines must be clearly marked with appropriate visual warning signs.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] The partnership agreement provides that, if the station is awarded to Radio, the general partner will enter into an employment agreement with the partnership to "act as general manager, sales manager, business manager, program director or other manager of the station, devoting 40 hours per week to her duties in this capacity." Radio Exh. 1, Att. A, at 5; Tr. 794. Ms. Murray does not know who would draft the contract (Tr. 798) or why the partnership agreement does not specify the position she proposes. Tr. 797.

[2] MCC is the 85% limited partner in Fresno Valley Radio Limited, applicant for a new FM station at Fresno, California. Tr. 1495-96. MCC is the 85% limited partner in Southern Indiana Broadcasting Limited, applicant for a new FM station at Mount Vernon, Indiana (Tr. 1480-81), and a shareholder in Champaign-Urbana Broadcasting Corporation, applicant for a new FM station at Champaign, Illinois. Tr. 1490-92.

[3] 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 Section 1.276(d).