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

MM Docket No. 88-421

In re Applications of

SCIOTO BROADCASTERS, Limited Partnership	File No. BPH-870514MU
MID-OHIO RADIO LIMITED	File No. BPH-870515NM
HORACE E. PERKINS	File No. BPH-870515NP

For Construction Permit for
New FM Station, Channel 298A,
Columbus, Ohio

Appearances

George R. Borsari, Jr., on behalf of Mid-Ohio Radio Limited; *William E. Kennard*, on behalf of Scioto Broadcasters, Limited Partnership; *Robert B. Jacobi, Lawrence N. Cohn*, and *Cheryl R. Glickfield*, on behalf of Horace E. Perkins.

DECISION

Adopted: June 22, 1990; Released: August 14, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Now before the Review Board are the *Initial Decision*, 5 FCC Rcd 424 (1990) (I.D.), of Administrative Law Judge Edward J. Kuhlmann (ALJ), and the exceptions (and replies) filed by the three remaining parties to this proceeding: [1] Scioto Broadcasters, Limited Partnership (Scioto); Mid-Ohio Radio Limited (Radio); and Horace E. Perkins (Perkins). Based upon our review of the pleadings, the hearing record below, and having heard oral argument on June 15, 1990, we affirm the ALJ's award of the construction permit at issue for a new Class A FM facility at Columbus, Ohio to Perkins.

2. In addition to the standard comparative issue, the *Hearing Designation Order*, 3 FCC Rcd 5480, 5484 (1988) (HDO), specified the following relevant issues (I.D., para. 1):

> [1] To determine, with respect to . . . Perkins:
>
> (a) The basis for, and the validity of, the cost estimates projected by . . . Perkins to build and to operate [his] respective proposed facilities without revenues for three months;
>
> (b) Whether [Perkins has] . . . sufficient net liquid assets on hand, or available from committed sources to construct and operate [his] . . . proposed facilities for three months without revenues;
>
> (c) Whether, in light of the evidence adduced pursuant to the foregoing issues, [Perkins is] financially qualified.
>
> [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: Scioto, Radio, 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.

CITY OF LICENSE COVERAGE ISSUE

3. No party has excepted to the ALJ's ultimate conclusion that (I.D., para. 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), [47 CFR § 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.

PERKINS

4. *Financial Considerations*: In the HDO, the Mass Media Bureau (Bureau) noted that it had randomly selected this proceeding to examine the financial aspects of each applicant pursuant to the Commission's *Public Notice*, FCC 87-97, released March 19, 1987. With respect to Perkins' estimates for construction and operation, the Bureau observed that his estimates were lower than those of the other applicants, and noted that the bank letter relied upon by Perkins to establish his financial qualifications did not indicate a specific interest rate to be charged for his proposed loan. It thus specified issues to inquire into Perkins' estimates and availability of funds, and whether or not he was financially qualified. HDO at 5482, 5484. No financial misrepresentation (or lack of candor issue arising therefrom) was specified against Perkins. *See id.*, at 5484.

5. Within thirty days of publication of the HDO, Perkins timely filed a Petition for Leave to Amend his application. The amendment included, *inter alia*, a new equipment cost estimate prepared by Harris Corporation, a revised monthly operating budget, and a letter dated October 24, 1988 from the Huntington National Bank

(Bank) indicating that it would loan Perkins up to $350,000, and specified the interest rate to be charged on the loan. The same day Perkins filed his amendment, he also filed a Motion for Summary Decision on the designated financial issues, contending that the amendment conclusively demonstrated that he was financially qualified to construct and operate his proposed facility.

6. Perkins' Petition for Leave to Amend was not opposed by any party. Perkins' Motion for Summary Decision was opposed only by Radio; however, that applicant raised no argument about the sufficiency of Perkins' revised financial proposal. Radio merely contended that Perkins' Motion did not address the alleged shortcomings in his initial financial proposal. By *Memorandum Opinion and Order*, FCC 88M-4151, released December 6, 1988, the ALJ (1) granted Perkins' unopposed Petition; (2) concluded that Radio's opposition to Perkins' Motion had thereby been rendered moot; and, (3) granted Perkins' Motion for Summary Decision.

7. In their Exceptions, Radio and Scioto argue that the financial issue against Perkins should not have been resolved by summary decision. Radio focuses on Perkins' initial proposal (submitted July 1, 1987), claiming that the ALJ's summary decision "had the effect of foreclosing any inquiry into the financial issue designated by the Commission." [2] Radio Exceptions at 6-7. Additionally, Radio and Scioto also now argue, for the first time, that Perkins' Motion for Summary Decision was improperly granted because, in their view, Perkins' amended financial showing relied upon a bank letter which was not a commitment to make a loan, but rather a mere "accommodation" letter. Radio Exceptions 8 - 11; Scioto Exceptions 20 - 23. These exceptors note that the October 24, 1988 Huntington Bank letter is conditioned on the following: (1) the filing of a formal loan application with the Bank; (2) collateral values and appraisals satisfactory to the Bank; (3) approval by the appropriate lending authorities of the Bank; and (4) financial information satisfactory to the Bank.

8. More specifically, the October 24, 1988 Bank letter provides as follows (Scioto Exceptions, Attachment 2):

> Mr. Horace E. Perkins
> 1039 Sunbury Road
> Columbus, Ohio 43219
>
> Dear Mr. Perkins:
>
> This letter will confirm the willingness of The Huntington National Bank to make available up to $350,000 for the purpose of constructing and operating a new FM Radio Station at Columbus, Ohio. While the final terms and conditions can not be established until the time at which such a loan would be extended, we have discussed a loan having the following terms:
>
> Borrower: Horace E. Perkins, an individual.
>
> Loan Amount: Three Hundred Fifty Thousand and No/100 Dollars ($350,000.00).
>
> Use of Proceeds: Start up costs associated with the financing of a FM Radio Station to be located in Columbus, Ohio.
>
> Interest Rate: Huntington National Bank Prime Commercial Rate, as defined in our loan documents, plus 2% and a 1% fee. The Prime Rate as of October 11, 1988 is 10.0%.
>
> Repayment: 5 Year term loan; interest only to be paid on the outstanding balance monthly for the first six months. Monthly Principal payments of $5,833 plus interest will begin six months after the loan is closed.
>
> Collateral: First lien on equipment and 2nd mortgage on real estate located at 1039 Sunbury Road.
>
> Our approval to advance the above-described loan is expressly subject to the following conditions:
>
> 1. The filing of a formal loan application with our Bank.
>
> 2. Collateral values and appraisals satisfactory to our Bank.
>
> 3. Approval by the appropriate lending authorities of our Bank.
>
> 4. Financial information satisfactory to the Bank.
>
> This letter is not to be construed as an approval or commitment for the above loan; rather it indicates our willingness to extend the above loan provided that the preceding conditions are met.
>
> Sincerely,
>
> Robert W. Erwin
> Vice President

9. Turning first to procedural considerations, the ALJ properly accepted Perkins' financial amendment pursuant to 47 CFR § 73.3522(b)(2). Perkins timely filed this amendment within 30 days of the publication of the HDO which, for the first time, raised financial issues against Perkins. Thus, Perkins' amendment was timely filed "as a matter of right." Additionally, since Radio and Scioto did not raise any objection as to the adequacy of Perkins' amended financial showing for nearly two years (until the filing of their exceptions before the Board), these untimely exceptions could be dismissed without further consideration. Nonetheless, in the interest of clarity, the Board will address Perkins' financial qualifications.

10. The Board has recently observed in numerous proceedings (1) that substantial and material questions of fact have been raised about financial proposals which have required a remand for further hearings on appropriate financial issues; or, (2) that various applicants must be disqualified on already-specified financial issues. *See, e.g., Shawn Phalen*, 5 FCC Rcd 53, 54 (Rev. Bd. 1990) (remand ordered where additional document from lending institution and principals' own testimony raised substantial and material questions of fact as to financial qualifications); *Global Information Technologies, Inc.*, 5 FCC Rcd

3385 (Rev. Bd. 1990) (remand where bank letter, *inter alia*, stated "although we have not reviewed financial information required by us to fully consider a loan commitment, we are *seriously interested in exploring* " a potential loan) (emphasis added); *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990) (affirming disqualification of applicant who obtained bank letter which merely stated that the bank " *has an interest* " in financing proposed facility, and that its letter "is not a commitment but rather *an expression of interest* . . . and *a tentative plan* of structuring the financing . . . ." Also, bank officer testified letter was only an "accommodation") (emphases added); *Aspen FM, Inc.*, 5 FCC Rcd 3196 (Rev. Bd. 1990) (disqualification where principal lender did not demonstrate "sufficient net liquid assets" at time of certification); *Charisma Broadcasting Corp.*, 5 FCC Rcd 2916 (Rev. Bd. 1990) (remand where questions raised as to documentation of availability of funds).

11. Although an applicant need not have a binding written agreement to certify that it is financially qualified, *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978), the Commission does require "reasonable assurance" of committed funding to construct the proposed facility and to operate for three months without revenue. The application form utilized by Perkins (*see* FCC Form 301, Instructions, Section III) provided as follows:

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

Additionally, the certifications specifically required by Questions 1 and 2 of Section III, FCC Form 301, were as follows:

> 1. The applicant certifies 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.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment or credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment . . . .

See JAM Communications, Inc., 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989). And, as the Commission noted in *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 (1989):[3]

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue . . . .
>
> * * *
>
> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds.

As the Board stated in *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986):

> The law is and remains that loan agreements and bank commitment letters must be prepared and must be sufficiently specific and complete to furnish reasonable assurance of the availability of the loans. *Jay Sadow*, 39 FCC 2d 808, 810, 26 RR 2d 1032, 1035 (Rev. Bd. 1973).

12. Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." *See, e.g., Rebecca Boedker, supra; Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (Rev. Bd. 1989). Conversely, where these fundamentals have been satisfied, we have found such "reasonable assurance." *See, e.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, FCC 90R-52, released June 25, 1990.

13. We find here that Perkins had established the requisite "reasonable assurance" of the "present firm intention" of the Huntington Bank to make funds available to him. While the Bank's letter is not a binding written agreement (which, of course, is not required, *see Las Vegas Valley, supra),* Perkins has submitted a document (the Bank letter) which specifically (1) identifies the borrower/applicant; (2) indicates the amount of the loan; (3) identifies the specific use of the proceeds of the proposed loan; (4) specifies a particular interest rate; (5) specifies terms of repayment; (6) identifies the specific collateral required; and (7) identifies specific conditions for final approval. Moreover, the exceptors have proffered nothing to indicate that the Bank letter is not valid, or is merely an "accommodation letter." *See generally Christina Communications, supra.* Indeed, as the Commission declared in *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980):

> Insofar as the bank's specific requirements are concerned, we are not troubled by the following language: "(t)his commitment is contingent upon final terms and amounts of capitalization of our potential borrower, the Merrimack Valley Broadcasting Co., Inc., being satisfactory to the Bank." For a bank to base its final decision on conditions existing at the time a grant is actually made is a common business practice which does not in and of itself make reliance on the commitment unjustified. *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), 44 RR 2d 487. A present firm intention to make a loan, future conditions permitting, is the essence of our "reasonable assurance" standard.

Thus, in light of the admitted failure of the exceptors to timely raise objections to Perkins' amended financial showing, and their failure to raise substantial and material questions of fact as to Perkins' "reasonable assurance" of the "present firm intention" of the Huntington Bank to make funds available to him to construct and operate as proposed, "future conditions permitting," all exceptions in this regard are denied.

14. *Actions of Counsel*: Scioto urges that Perkins' counsel, Cohn and Marks, should have been "disqualified" in this proceeding. More specifically, Scioto (1) contends that Perkins' counsel violated the Code of Professional Responsibility by its representation of Perkins in this proceeding and its simultaneous representation of another former applicant here, Clear Channel Communications, Inc. (Clear Channel), in matters unrelated to this proceeding; and (2) seeks a remand for additional cross-examination of Perkins, due to alleged inadequate examination of him at hearing. Perkins replies (Reply to Exceptions at 11-12) that counsel commenced representation of Perkins in connection with this Columbus allocation several years prior to the announcement of the Columbus "filing window." After the window was announced, another client of the firm, Clear Channel, expressed interest in filing for this same frequency. Counsel informed Clear Channel of its prior retention by Perkins, and advised that it could not represent Clear Channel in this proceeding. "The firm also discussed the matter with Perkins, informing him of the various ways in which its ability to represent him would be limited, should he desire to continue to retain the firm as his counsel." (*Id.*) Perkins consented to these limitations on the firm's ability to represent him, and reaffirmed retention. Perkins claims he "did so because he saw no need to attack Clear Channel's application in this proceeding, given that his own comparative credentials would of necessity be greatly superior to any showing which the publicly-traded, multi-station owner Clear Channel entity could hope to muster." (*Id.*)

15. It is further claimed by Perkins that, "due to the disparity between the relative comparative strengths of the two applicants," counsel perceived no need to engage in any attack on the Clear Channel application in order to provide adequate representation of Perkins, and "it therefore did not withdraw from representation of Perkins. Clear Channel, as well, perceived no conflict in the situation, and it proceeded to retain its own separate, independent counsel, the firm Wilner & Scheiner, to represent it in connection with its Columbus application" (*id.*). Thus, Perkins' counsel did not perceive any reason requiring it to withdraw from representation of Perkins in this proceeding because (1) the two clients involved gave their consent to the multiple representation; (2) Perkins requested that the firm continue as his counsel; and (3) the firm did not perceive any impediment, under the specific circumstances of the case, to its ability to render representation "adequate to the purposes of [its] clients." Perkins' counsel further claims that this action "was consistent with the applicable disciplinary rules, as interpreted by the relevant D.C. Bar Legal Ethics Committee opinions." (*Id.*)

16. Both the Board and the Commission are reluctant to resolve claims of attorney misconduct in advance of review by relevant bar officials charged with maintaining ethical standards, *see, e.g., Opal Chadwell*, 2 FCC Rcd 3458 (1987), and will intervene only where, for example, a conflict is so clear that an untainted record would be all but impossible to achieve, thus requiring a hearing *de novo, see Dorothy J. Owens*, 104 FCC 2d 848 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 38 (1987), *petition for judicial review dismissed on other grounds sub nom. Law Offices of Seymour M. Chase, P. C. v. FCC*, 843 F.2d 517 (D.C. Cir. 1988) (table), or where the conduct of an attorney is so opprobrious or disruptive that immediate action must be taken to preserve the integrity of FCC processes. *See , Benedict P. Cottone*, 39 RR 2d 1661, *recon. denied*, 41 RR 2d 241 (1977); *cf. Thomas Root*, FCC 90-240, released June 28, 1990. Neither situation obtains here. Upon reviewing the pertinent authorities, we find that the essence of the law's demand in situations such as that before us is "informed consent," [4] and the unchallenged representations before us reflect that Perkins' was fully aware of his counsel's long-time representation of Clear Channel in other proceedings, of counsel's refusal to seriously attack Clear Channel here, and yet retained the law firm for representation. We find no absolute conflict, nor do we believe that counsel's alleged failure to attack Clear Channel is significant. All of the other parties had a full opportunity to discredit Clear Channel (which has since withdrawn its application and has been dismissed, *see Order*, FCC 90R-56, released July 5, 1990), and Scioto has not explained how it has been prejudiced *vis a vis* any other remaining applicant. Its exceptions in this regard are denied.

17. *Perkins' Comparative Considerations*: The ALJ found that Perkins, an individual African-American applicant, proposes to work full-time as the general manager (and sales manager) of his proposed facility. Perkins has lived in the proposed community of license (Columbus, Ohio)

continuously for over 26 years, and has been employed at WVKO(AM), Columbus, Ohio for over 27 years. I.D., para. 68. Scioto does not except to these findings of the ALJ, but Radio claims that Perkins is entitled to no credit whatsoever for his 26-year continuous residence in Columbus, because Perkins "does not have any record of civic participation . . . ." (I.D., para. 104). Radio further claims that Perkins is not entitled to any credit whatsoever for his broadcast experience because his job was "non-managerial," [5] and his broadcast experience was no more "than the fact that he may have listened to the radio with interest over the last twenty years." Radio Exceptions at 21-23.

18. Radio's exceptions as to Perkins' comparative attributes will be denied. Local residence and civic participation are discrete factors and extensive residence, as here, is entitled to substantial credit in its own right. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-396 (1965) (" *Policy Statement* "); *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 947 (1985). Further, broadcast experience is cognizable, whether or not of a managerial nature. *James and Sharon Deon Sepulveda*, 3 FCC Rcd 9 (Rev. Bd. 1988); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 (Rev. Bd. 1986)(subsequent history omitted); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 849-850 (Rev. Bd. 1981)(subsequent history omitted)("the *Policy Statement* [does not] require that . . . broadcast experience be management-related . . . ."). Perkins will receive full credit for his proposed 100% integration into ownership and management (a factor of "substantial importance," *see Policy Statement* at 395; *Julia S. Zozaya*, 5 FCC Rcd 856 (Rev. Bd. 1990)), substantial credit for long-term local residence, significantly enhanced by extensive broadcast experience (*see Policy Statement* at 396), and minority participation (*see Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (decided June 27, 1990)). Perkins will also receive comparative credit for auxiliary power; and, because Perkins has no interest in any medium of mass communications, no demerit will be assessed in this regard. *See Policy Statement* at 394-395.

SCIOTO

19. Scioto is depicted as a limited partnership, with one general partner, Paul D. Warfield, an African-American, who holds 25% of the equity. Scioto Exh. 1, at 1. It claims 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.* Warfield proposes to work full-time 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. I.D., para. 45. Scioto has no attributable mass media interests. *Id.*, para. 70.

20. Warfield previously lived in Columbus (from 1960 to June 1964 and from January 1965 to June 1965), apparently while a college student. From June 1987 through October 1988 he "maintained a part-time residence in Columbus." He currently lives (since November 1988) in Gahanna, Ohio, which is located within the service area of Scioto's proposed station. Warfield's permanent residence at the "B cutoff" date was Beachwood, Ohio (near Cleveland), over 100 miles from Columbus. Tr. 653-64. From June 1987 to October 1988, Warfield worked in Dayton, Ohio. Tr. 655. Over the past 16 years, Warfield has been employed by one radio station, eight television stations, and various television networks in positions including: (1) "part-time sportscaster 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; I.D., paras. 46-47.

21. The ALJ determined that Warfield has been active in civic affairs since he returned to the Columbus area (subsequent to the time Scioto filed its application) in 1987; however, the ALJ concluded that Warfield's residence in Columbus, and his recent civic activities, did not outweigh Perkins 27-year, continuous residence in Columbus. I.D., para. 104. While Warfield and Perkins both have broadcast experience, the ALJ concluded that Perkins was to be preferred "because his experience is full time, continuous, and of long duration." *Id.*, at para. 105.

22. Scioto does not except to any of the ALJ's findings or conclusions with respect to its application. Radio argues only that Warfield has conflicting business interests (*i.e.*, Warfield testified he will continue to work at his business, as President of Warfield and Morgan, for some 20 hours per week), and thus should not receive credit for full-time integration of ownership into management. Perkins claims that the ALJ did not quantify the "civic participation" enhancement awarded Scioto, which, at best, should only be "slight." (Perkins Contingent Exceptions at 3.)

23. With respect to Warfield's "civic participation," *MTF Enterprises*, 99 FCC 2d 297, 300-301 (Rev. Bd. 1984) holds that:

> In . . . *Bradley, Hand and Triplett*, 89 FCC 2d 657, 663 (Rev. Bd. 1982), we held that civic activities that post-date the application filing date will be accorded some credit, "although not as much as a past record of such activities would warrant." We reasoned there that because the *Policy Statement*, *supra*, 1 FCC 2d at 396, accords some credit for proposed future local residence, albeit less weight than residence of several years' duration, and past civic participation is considered a part of an owner's local residence background, some slight credit should be awarded current civic involvement. *See also Radio Jonesboro, Inc.*, 55 RR 2d 991, 994 (Rev. Bd. 1984). Similarly, we hold that local residence beyond the application filing date might also receive some light recognition, but not so much as would accrue to a history of local residence of several years' pre-application duration.

Thus, Warfield is entitled to only slight credit for his post-filing civic activities.

24. In comparing Perkins and Scioto, both applicants are equal with respect to quantitative "integration" of ownership and management, minority enhancements, auxiliary power, and neither applicant has attributable mass media interests. However, we hold that Perkins is clearly preferred over Scioto because of his long-term continuous local residence, which significantly exceeds

Scioto's limited residence credit and minor edge for civic participation, *see Radio Jonesboro, Inc.*, 100 FCC 2d 941, 948 (1985), as well as for Perkins' longer broadcast experience. Radio's exceptions, which would only further diminish Scioto's comparative status, are thus not decisionally significant.

RADIO

25. The ALJ determined that Radio's sole general partner, Karen Murray, proposes to work full-time at the station as its general manager. Murray holds only 15% of the equity of the applicant. Of two limited partners, McFadden Communications Corporation (MCC) holds an 80% equity interest and William Roth holds a 5% equity interest. I.D., para. 94. 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) until early 1988. From 1980 to 1985 she was employed at various broadcast stations (*id.*, at para. 100), and was apparently somewhat involved in Columbus civic activities (*id.*, at para. 65).

26. However, the ALJ held (*id.*):

> 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.

27. Radio excepts to the "reduction" of Murray's integration credit. (Radio Exceptions at 12-13.) Scioto argues that Radio is entitled to no integration credit whatsoever, claiming that Radio's application is a "sham." (Scioto Exceptions at 24-36.) Perkins agrees, noting that the *bona fides* of Radio's application was not properly tested at hearing because, *inter alia*, of the failure of attorney Douglas McFadden, a principal of limited partner MCC, to respond to questions at hearing. (Perkins Exceptions at 5-6.)

28. More specifically, Scioto observes (Exceptions at 24-33):

> The Presiding Judge concluded that Mr. McFadden organized the applicant. I.D. at para. 94. Mr. McFadden, never having inquired into or seen Ms. Murray's financial records, mailed her a limited partnership agreement, prepared by his law office. I.D. at para. 57. The agreement had the name of the limited partnership and the partners' equity percentages already filled in. *Id.* Ms. Murray retained Mr. McFadden's law firm without knowing its hourly rates. I.D. at para. 59. The firm has a deferred billing arrangement with Radio (I.D. at para. 60) even though it does not have such arrangements with the vast majority of its clients. *Id.*
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> * * *
>
> Mr. McFadden's firm began as Radio's counsel and continues to provide legal services, on a deferred-payment basis. I.D. at para. 60. Capital contributions have not been made on a *pro rata* basis and, in Mr. Roth's case, not at all. I.D. at para. 63. Contributions have been made almost entirely by MCC. I.D. at para. 63. No negotiations ever took place over the respective ownership interest of the partners. I.D. at para. 57. Ms. Murray simply ratified the offer presented by Mr. McFadden. I.D. at para. 57.
>
> * * *
>
> Ms. Murray has paid only $1,500 to Radio to date. I.D. at para. 63. She has directed all of Radio's capital calls to MCC/McFadden which has exceeded its 80% *pro rata* share. I.D. at para. 63. Most importantly, Radio need not pay legal fees until this proceeding has terminated. I.D. at para. 60. By controlling access to legal services, Mr. McFadden is able to exert considerable influence over Radio. At the hearing, Mr. McFadden repeatedly refused to comply with the Presiding Judge's directives to answer questions. I.D. at 64. The Presiding Judge found that Mr. McFadden displayed a "hostile and contemptuous attitude" toward the Presiding Judge and was "totally uncooperative." *Id.*

29. Under the circumstances here present, Radio would not in any event be entitled to more than 15% "integration" credit for Murray's proposed role as "general manager" in light of the limited partner's active role as counsel. *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988) (McFadden firm involved in limited partnership; Commission holds equity interest of limited partners who provide legal services are attributable). Moreover, given the fact that Radio's partnership agreement provides that Murray's actual position at the proposed facility will not even be determined until *after* grant, even that 15% "integration" credit cannot be awarded here. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1614-1615 (Rev. Bd. 1985). Radio is therefore clearly out of comparative consideration.[6]

CONCLUSIONS

30. The Board has here determined that Perkins, on a comparative basis, is entitled to 100% quantitative integration credit augmented by credit for long-term 26-year continuous residence in the proposed city of license, substantial long-term 27-year broadcast experience, minority participation, and auxiliary power. Even with Scioto's principal, Warfield, receiving 100% "integration" credit, his local residence is of significantly lesser duration. Thus, notwithstanding his slight advantage for civic participation, his minority and auxiliary power enhancements, and credit for some broadcast experience, Scioto cannot prevail over Perkins. With little or no quantitative credit, Radio finishes a distant third. In light of the foregoing, Perkins is clearly preferred, and will be awarded the construction permit at issue here.

31. With respect to the "environmental impact" issue specified against Perkins, the ALJ concluded (I.D., para. 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.

Thus, the grant of the construction permit is conditioned to the extent that Perkins, upon construction, will be fully in compliance with the foregoing to provide protection from nonionizing radiation.

32. ACCORDINGLY, IT IS ORDERED, That the applications of Scioto Broadcasters, Limited Partnership (File No. BPH-870514MU) and Mid-Ohio Radio Limited (File No. BPH-870515NM) ARE DENIED, and the application of Horace E. Perkins (File No. BPH-870515NP), for a new Class A FM facility at Columbus, Ohio, IS GRANTED, subject to the environmental considerations set forth in paragraph 31, *supra*.[7]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Twelve applicants were originally designated for hearing. *See Hearing Designation Order*, 3 FCC Rcd 5480 (1988).

[2] In the HDO (at 5482), the Bureau stated as its basis for inquiry into Perkins financial qualifications that Perkins' estimates were "significantly lower than the estimates provided by the other applicants, with the exception of [two others no longer parties to this proceeding]." It is clear that the Board has no authority to review the issues specified in the HDO. *Frank F. Yemm*, 39 RR 2d 1657 (1977). Thus, the exceptors' claim that the Board should modify the HDO and add a misrepresentation issue against Perkins based upon his initial financial showing is without merit. Additionally, having reviewed the financial qualifications of Perkins (as noted in text), we find no independent basis for adding such an issue.

[3] Scioto argues (with respect to seeking a financial misrepresentation issue against Perkins) that Perkins had only "verbal discussions" with the Bank prior to the time he filed his application. As noted in the text, Perkins timely amended his application as "a matter of right" and satisfied the financial issues specified against him. As *Northampton* permits, these initial "verbal discussions" were subsequently documented, and Perkins has submitted "probative evidence" of his source of funds. "[U]nder the provisions of [FCC] Form 301 in effect [at the time Perkins filed his application], oral loan agreements are not presumptively invalid and supporting documentation need not necessarily be in existence at the time of certification." *Northampton*, at 5519.

[4] Perkins also observes (Reply at 9-10; footnotes omitted):

> Scioto's primary argument concerning the ethical issue is that the District of Columbia Code of Professional Responsibility embodies an "absolute prohibition" of what Scioto vaguely terms the "simultaneous representation of clients in the context of litigation." Scioto Exceptions at 6-9 & 14 (citing District of Columbia Bar Legal Ethics Committee Opinion No. 131). Scioto is simply wrong about the law. The provisions of DR 5-105 of the Code do not, by their express terms, create any "absolute prohibition" of multiple representation where litigation is involved, and neither the decisions which Scioto cites nor any other interpretive decisions have construed the Code as creating an "absolute prohibition" of simultaneous representation "in the context of litigation." Rather, the decisions uniformly indicate that, whether the representation in question entails litigation or other matters, it is permissible, if (1) the clients involved have given their informed consent; and (2) adequate representation can be provided . . . .
>
> D.C. Bar Ethics Opinion No. 49; *accord, e.g.*, D.C. Bar Ethics Opinion Nos. 54, 68, 92, 94, 106, 131, 136, 140, 163 & 165; *see e.g., City Consumer Services, Inc. v. Horne*, 571 F.Supp. 964, 970-71 (C.D. Utah 1983) (citing *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981)); *see also Duca v. Ramark Industries*, 663 F.Supp. 184, 190 (E.D. Pa. 1986); *Clay v. Doherty*, 608 F.Supp. 295, 302-03 (N.D. 111. 1985). Indeed, many of the D.C. Bar Ethics Opinions which interpret DR 5-105(C) of the Code expressly *approve* instances of simultaneous representation *in the context of litigation. E.g.*, D.C. Bar Ethics Opinion Nos. 54, 92, 136, 140, 163 & 165; *cf.* D.C. Bar Ethics Opinion No. 106; *see also, e.g., City Consumer Services, Inc. v. Horne, supra; Clay v. Doherty, supra.*The decision on which Scioto principally relies, D.C. Bar Ethics Opinion No. 131, did not purport to create any "absolute" ban on multiple representation in circumstances involving litigation. Rather, Opinion No. 131 -- which is "the only instance in which [the D.C. Bar Legal Ethics] committee has refused to give effect to consent to simultaneous representation in circumstances not involving conflicting representation in the same matter--turned on the unique facts of the multiple" representation there involved . . . .

Finally, although not to take effect until January 1, 1991, the new *Rules of Professional Conduct of the District of Columbia Bar* continue to trend toward "informed consent" in potential conflict situations. Thus, under Rule 1.7, unless there is a conflict in the "same matter," a "lawyer may represent a client . . . if:

> "(1) Each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and,
>
> (2) The lawyer is able to comply with all other applicable rules with respect to such representation."

Rule 1.7(c). (We do not comment here on whether Perkins' law firm's attitude toward Clear Channel implicates Rules 1.3 ("Diligence and Zeal") for the reasons set forth in paragraph 16 of text.)

[5] Perkins claims that the ALJ failed to make a finding that Perkins "had responsibility for managing the station's sales staff in the absence of the sales manager for approximately 1 month per year during the past 5 years." Perkins Contingent Exceptions at 4. Perkins showing in this regard is uncontroverted and unimpeached.

[6] Even if Murray were to receive full 100% "integration" credit, Radio could not prevail over Perkins. Murray was a resident of Columbus between August 1985 to May 1988, promises to return to the area if Radio's application is granted, and is entitled to credit for some broadcast experience. However, none of these attributes can outweigh Perkins multiple superior comparative preferences (*see* para. 18, *supra).* That is, Perkins' substantial local residence preference outweighs Radio's promise to have Murray relocate to Columbus and its minor civic participation credit, *see Radio Jonesboro, supra,*at 948, his minority enhancement credit exceeds Radio's female enhancement credit, *see Horne Industries, Inc.,* 98 FCC 2d at 601, 603 (1984), and Perkins plainly has greater broadcast experience than Radio.

[7] The release of this document has been delayed by computer problems.