

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

## MM Docket No. 90-94

## In Re Applications of

BIBLE BROADCASTING NETWORK, INC. File No. BPED-880301ML

WEISS BROADCASTING OF NOBLESVILLE, INC. File No. BPH-880301MQ

BROADCAST COMMUNICATIONS, INC. File No. BPH-880301MZ

BEN L. UMBERGER File No. BPH-880301PD

For Construction Permit for  
New FM Station on Channel 230A,  
Noblesville, Indiana

## Appearances

Gary S. Smithwick and Lisa Thornton on behalf of Bible Broadcasting Network, Inc.; Donald J. Evans and Andrew D. Fisher on behalf of Weiss Broadcasting of Noblesville, Inc.; Nathaniel F. Emmons on behalf of Broadcast Communications, Inc.; and Stephen C. Simpson on behalf of Ben L. Umberger.

## DECISION

Adopted: December 20, 1991; Released: January 15, 1992

By the Review Board: MARINO (Chairman),  
BLUMENTHAL, and GREENE  
Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann, 6 FCC Rcd 3576 (1991), which granted the construction permit application of Weiss Broadcasting of Noblesville, Inc. (Weiss) and denied the applications of Bible Broadcasting Network, Inc. (Bible), Broadcast Communications, Inc. (BCI), and Ben L. Umberger (Umberger). The losing applicants have excepted to the *Initial Decision*, and Weiss has filed contingent exceptions. The Board held an oral argument on October 18, 1991, in which Weiss and BCI participated.<sup>1</sup> For the reasons set forth below, we are affirming the grant to Weiss.

2. The *Hearing Designation Order* in this proceeding, *R&B Ltd.*, 5 FCC Rcd 1901 (1990), originally designated these four applicants and four additional applicants for

hearing on the "standard comparative" issue, which is governed primarily by the guidelines set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). In addition, the ALJ designated the following issues against BCI:

1. To determine whether BCI misrepresented or lacked candor by representing that Julio Fernandez has no other attributable media interests.
2. To determine whether BCI transferred control of station WYIC in 1985 without prior Commission approval.
3. To determine whether, in light of the foregoing, BCI has the requisite qualifications to be a Commission licensee.

*R&B Ltd.*, FCC 90M-1594 (Admin. Law Judge, released June 27, 1990).

3. After hearing evidence on these issues, the ALJ concluded that BCI is not qualified. He found that BCI deliberately withheld information about the corporate officer position held by Fernandez, a BCI shareholder and officer, with Wabash Valley Broadcasting Corporation, which holds broadcast licenses in Florida and Indiana and owns two radio networks serving radio stations in Indiana as well as the program production and syndication division headed by Fernandez. *Initial Decision* at 3576-77 para. 4. 3582 para. 54. The ALJ also found that BCI willingly turned over control of daytime-only AM station WYIC, Noblesville, to a prospective purchaser without prior Commission approval. *Initial Decision* at 3583-84 para. 63. The ALJ would not have disqualified BCI for the Wabash Valley incident, but when he weighed that with the transfer of control incident, he concluded that BCI has not demonstrated its basic qualifications. *Initial Decision* at 3582 para. 54. 3583-84 para. 63. 3585 para. 73.

4. Of the remaining three applicants, the ALJ found that only Weiss and Umberger are entitled to full quantitative integration and that Weiss is preferred qualitatively under the integration factor. She has lived in the service area for many years and been active in civic affairs, has past broadcast experience, and is a female. Umberger, on the other hand, has more broadcast experience but will not move to Noblesville unless he wins the authorization. *Initial Decision* at 3585 para. 71. The ALJ also found that Weiss is superior under the diversification factor because she has no other broadcast interests, whereas Bible is the licensee of several stations, and Umberger did not show he does not have other interests. *Id.* at para. 72. Weiss is the only one of the three who proposed auxiliary power.

5. *Weiss*. Two of the applicants challenge the integration credit given Mary B. Weiss for her promise to work at the station full time as its general manager. Weiss is an Indiana corporation with both common voting stock and preferred non-voting stock. *Initial Decision* at 3579 para. 25. Ms. Weiss is president, secretary, and treasurer of the corporation and holds all of the authorized voting shares. Her son holds preferred Class B shares, and four others hold preferred Class A shares. Ms. Weiss and her son

<sup>1</sup> Bible and Umberger notified the Board that they did not plan to attend the argument and would rest on their exceptions.

contributed one-seventh of the funds but hold 76.1 percent of the equity. Referring only to this disparity and the fact that two of the preferred shareholders are successful businessmen who once had media interests,<sup>2</sup> Umberger asserts that Weiss' investors must be in control and, therefore, the application must be a sham.

6. To obtain comparative credit, an applicant must establish the overall reliability of its integration proposal. See *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). If it does not do so, the Commission will not take the applicant's claim to integration credit at face value. See generally *Coast TV*, 5 FCC Rcd 2751, 2752-53 para. 15 (1990). Here, Ms. Weiss has made the required showing. She has committed to terminating her current employment and has no other business obligations that could conflict with her integration pledge. Weiss Ex. 2. She formed the corporation in February 1988 with one class of stock and in June 1988 amended the articles of incorporation to authorize issuance of non-voting preferred stock. The current preferred shareholders entered the company in 1990 at her invitation. *Id.*; *Initial Decision* at 3579 para. 25.

<sup>2</sup> Thomas Binford, a banker, once held broadcast and cable television interests. Fred Tucker, a realtor, once had an interest in a cable television franchise.

<sup>3</sup> Umberger argues that the ALJ erred in refusing to add issues requested by R & B, Ltd., an applicant who dismissed its application before the ALJ had acted on all of its three petitions to enlarge the issues against Weiss. The ALJ denied R&B's petitions in *Memorandum Opinion and Order*, FCC 90M-1594 (released June 27, 1990), and *Memorandum Opinion and Order*, FCC 90M-2822 (released Sept. 10, 1990). Umberger complains of these rulings because "the parties were foreclosed from cross-examination at the hearing regarding same." Umberger Exceptions to Initial Decision, page 9, an argument that does not meet the showing of "points of fact and law relied on" that is required by 47 C.F.R. sec. 1.276 (a)(2)(v). The Board has no obligation to fashion arguments for parties and for this reason alone could dismiss Umberger's exception as unsupported. Although the Commission is expected to look beyond procedure when it is shown "a good deal of smoke," *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985), that is not the case here. We have reviewed the R & B petitions that Umberger has asked us to officially notice and find more speculation than fact. We conclude from them and the responsive pleadings filed by Weiss that there is no substantial and material question of fact concerning Weiss' qualifications. See generally *Citizens for Jazz on WRVR*. As the court stated clearly in *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988), "mere conclusory allegations are not sufficient" to trigger a factual dispute.

R & B filed a Petition to Enlarge on April 10, 1990, after spotting inconsistencies in the numbers of shares of stock reported in Weiss' March 1989 annual report filed with the Indiana Secretary of State and its application in this proceeding. R & B sought a misrepresentation issue and further speculated that there must be a problem with Weiss' financial qualifications. Weiss responded that the annual report had errors because of Ms. Weiss' inexperience with such reports, and that these errors had been corrected in her 1990 report filed with the Secretary of State before R & B filed its petition with the ALJ. Weiss Opposition to Motion to Enlarge, April 25, 1990. In addition, although R & B's allegations about Weiss' financial qualifications were purely speculative, Weiss showed that its certification of its financial qualifications was based on a bank lending commitment issued after the bank had reviewed Ms.

Neither Umberger nor Bible point to anything in the record that suggests that the passive investors have been anything other than passive in their investments in Weiss or that otherwise contradicts Ms. Weiss' pledge. The passive investors here are inconsequential for integration purposes, and Weiss is entitled to full integration credit based on Ms. Weiss' proposal to integrate her voting ownership full time into management. See generally *Swan Broadcasting Limited*, 6 FCC Rcd 17, 19 para. 12 (Rev. Bd. 1991).<sup>3</sup>

7. *BCI*. BCI excepts to the ALJ's conclusion that it is not qualified to become a licensee of the Noblesville facility and argues that it is the comparatively superior applicant because of its claimed eligibility for the daytimer preference provided in *Availability of FM Broadcast Assignments*, 101 FCC 2d 638, 644-47 (1985), *clarified*, 59 RR 2d 1221 (1986). Weiss agrees with the ALJ and argues further that BCI's current ownership structure is a sham created on the eve of the cut-off for BCI's comparative advantage. In our analysis, we have assumed that BCI is fully qualified to hold a license and that BCI is entitled to the 90.95 percent integration credit it claims for the

Weiss' personal finances. In FCC 90M-1594 the ALJ held, "It appears that Weiss made a few errors in reporting but those errors did not change the form or substance of Weiss' ownership." Para. 4.

R & B filed its Second Petition to Enlarge on August 1, 1990, alleging that Ms. Weiss had offered her potential license as collateral for a new bank loan and Weiss was not as forthcoming as R & B had wished in document production. R & B inferred that Weiss was no longer financially qualified because the bank had denied the new loan and Weiss was obligated to pay dividends to the new preferred shareholders during the pendency of the proceeding. In its August 13 opposition, Weiss demonstrated that its underlying financial qualifications had not lapsed. Ms. Weiss had merely pursued a firm financial commitment from an alternate bank in Noblesville but was premature in doing so. Weiss also showed that both Ms. Weiss and the bank understood that she intended using Weiss stock as collateral, not an FCC license. The ALJ correctly concluded in FCC 90M-2822 at para. 7 that "Weiss has demonstrated that R & B's contentions are without foundation."

R & B filed its Third Petition to Enlarge on August 10, 1990, asking the ALJ to add an abuse of process issue against Weiss. Counsel for Weiss had written to counsel for R & B questioning whether R & B's general partner had an ethical problem under ethics rules for the United States House of Representatives because, as a Congressman's principal staff assistant, she accepted an equity interest in the applicant disproportionately greater than her expected investment in the applicant. In its August 23, 1990, opposition, Weiss explained that R & B's general partner had received a 25 percent partnership interest but was obligated to provide only one percent of the equity, that the general partner had no previous broadcast experience, and that R & B repeatedly emphasized the general partner's connection to the Congressman for whom she worked as her most important asset. Weiss had suggested that Weiss and the general partner seek a private ruling on the question from the House Ethics Committee. The ALJ correctly held that "Weiss' explanation of its actions demonstrates that it did not use the Commission's processes improperly." FCC 90M-2822 at para. 8.

full-time employment of its president at the station, BCI Ex. 1, pp. 4-5. On the basis of our comparative evaluation of BCI and Weiss, we conclude that Weiss is preferred to BCI.

8. *Diversification*. BCI is an Indiana corporation, which was incorporated in 1978 with one class of common stock and restructured a few days before the application was filed by adding Class A and Class B common stock. As a result of this restructuring, BCI has issued and outstanding 505 shares of common stock with one vote each, one share of Class A stock with 8,540 votes, and one share of Class B stock with 415 votes. Each share of stock is equal in value to every other share, regardless of voting rights. BCI Ex. 1, p. 1. Emmett E. DePoy, BCI's President, Assistant Secretary and Treasurer, holds 100 shares of common stock and the sole share of Class A stock. With this, he has 91.33 percent of the voting rights (90.95 percent at the cut-off date) and 19.22 percent of the equity. *Id.* at page 2. He is the only BCI owner who proposes to be fully integrated in the applicant's day-to-day operations. Julio Fernandez, BCI's Vice President and Secretary, holds 65 shares of common stock and the sole share of Class B stock. He has 5.07 percent of the voting rights and 13.02 percent of the equity. *Id.* Fernandez also is Vice President and General Manager of TelX Entertainment, the video syndication and production division of Wabash Valley Broadcasting Co., and is a corporate vice president of Wabash. Wabash is the licensee of WTHI-AM-FM-TV, Terre Haute, Indiana, (about 80 miles from Noblesville. BCI Ex. 2, p. 4) and two television stations in Florida. It owns two radio networks: Network Indiana, which provides news programming to 46 radio stations in Indiana; and Agri-America, which provides programming to 65 radio stations, most of which are in Indiana. *Initial Decision* at 3576 para. 4. BCI has no other officers.

9. BCI's remaining shareholders have interests ranging from 0.42 percent to 1.06 percent of the voting rights (7.89 percent to 19.72 percent of the equity). BCI Ex. 1, p. 2. Of these, only Robert A. and Sandra S. Borns, who jointly own 40 shares of common stock (0.42 percent of the voting rights), have any other media interests. *Id.*, pp. 3-4. Robert Borns owns 5.7 percent of the voting stock and is a director of Heritage Partners Management, which is the general partner of University Broadcasting Co., the licensee of FM broadcast stations in Lafayette and Bloomington, Indiana. Heritage owns three percent of the equity in University and also owns 34.98 percent of University's limited partner. Sandra Borns owns 4.4 percent of the voting stock in Heritage. In addition, Ms. Borns and James Morris (1.06 percent of BCI's voting rights and 19.72 percent of its equity) have been members of the Board of Trustees of Butler University, licensee of educational station WAJC-FM, Indianapolis. *Initial Decision* at 3580 para. 39. These interests are *de minimis*. See *Canon's Point Broadcasting Co.*, 93 FCC 2d 643, 647-48 para. 8 (Rev. Bd. 1983) (subsequent history omitted).

10. BCI has no directors. Under the Articles of Restatement of the Articles of Incorporation of Broadcast Communications, Inc., adopted a few days before BCI filed its application, BCI Ex. 1, Tab B, the duties normally per-

formed by directors shall be performed by the shareholders, including service on any committees of shareholders. *Id.* at 6. Shareholders may meet periodically, *id.* at 8-9, although, Fernandez testified that he attended only one shareholders meeting since the Articles of Restatement were adopted, on May 11, 1988. BCI Ex. 2, p. 3. Special meetings can be held on demand of holders of twenty-five percent of the votes. Articles of Restatement, sec. 7.2, BCI Ex. 1, Tab B, pp. 8-9. Actions requiring shareholder or committee meetings can be taken without a meeting if written consents are signed by all shareholders or committee members entitled to vote at the meeting. *Id.*, sec. 7.3, p. 9.

11. In its *Policy Statement* at 394, the Commission clearly stated that diversification of the control of the media of mass communications is "a factor of primary significance" in its licensing decisions. The Commission was guided by the Supreme Court's statement in *Associated Press v. United States*, 326 U.S. 1, 20, that the first amendment to the Constitution "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Policy Statement* at 394 n. 4. The Commission also clearly stated that it will consider both common control and "less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest... the less will be the significance of the factor." *Id.* at 394. Both direct and indirect media interests are relevant to the diversification analysis. See *CJL Broadcasting, Inc.*, 95 FCC 2d 544, 549 para. 11 (1983).

12. BCI argues that, in its case, diversification should have little significance because Fernandez' Wabash position does not involve broadcasting. We disagree for, as the record shows, Fernandez is not fully insulated from contact with the other parts of the company, and there is some overlapping of interests. Wabash is a single corporation with separate divisions (but not separate subsidiaries) for its broadcasting, network, and video production/syndication interests. Fernandez has "performed in an advisory capacity in one of [Ocala Station WOGX] events" and has provided advice to "WFDX, the station in Fort Myers for the same purpose." i.e., coverage of a parade. Tr. 582. Typical of the advice would be an exchange between Fernandez and the station general manager regarding talent at the event. Tr. 583-84. Fernandez once attended the Indiana Broadcaster's Convention. Tr. 584. He and the other corporate vice presidents who head divisions usually attend Board meetings, which are held at a Wabash television station, to make presentations to the Board. Tr. 586. The presentations are attended by all the division heads and address philosophy, accomplishments, and future plans, Tr. 588-89, but division heads do not comment on the presentations of other divisions or discuss operations with each other.

13. In *Attribution of Ownership Interest*, 97 FCC 2d at 1008 para. 19,<sup>4</sup> 1009 para. 21, the Commission specifically found that officers and directors of licensee corporations are attributable whether or not they have any ownership interest in the corporation, because of the opportunity they have to influence multiple broadcast licensees.<sup>5</sup> The

<sup>4</sup> There the Commission noted that "those parties who wield particular influence are reasonably certain to appear as officers

and directors and to have an interest attributed on that basis."

<sup>5</sup> Attributable interests for purposes of diversity analysis have

Commission did recognize that its premise might not be valid in all cases, so it provided a waiver mechanism for officials "whose duties and responsibilities are neither directly nor indirectly related to the activities of any broadcast licensee in which their corporation has a cognizable interest." *Id.* at 1025 para. 58; *see id.* n. 67. BCI would have the Review Board act as if there had been a waiver, *see* Tr. 793, 795, 800-801, but no formal waiver has been requested here, and no information has been provided about Wabash's views on Fernandez' current or future role with the company or on an attribution waiver for Fernandez. More important, as noted above and as found by the ALJ at *Initial Decision* at 3577 para. 4, Fernandez has had involvement with Wabash's stations.<sup>9</sup>

14. BCI also argues that Fernandez is inactive at BCI. *See* BCI Ex. 2, pp. 3-4. Nonetheless, Fernandez does have slightly more than five percent of the voting rights at BCI through his stock ownership, and he is the only corporate officer of BCI other than the president. Although BCI would have us treat his role as passive in fact, even if not passive by law, we are having difficulty reconciling his position as Vice President and Secretary with BCI's assertion of his non-involvement. We note further that BCI shareholders function in lieu of a board of directors. Although the shareholders have not met since the cut-off date, we cannot assume that they will never play a role. Indeed, BCI's Articles of Restatement at sec. 7.3 provide that corporate actions requiring shareholder approval cannot be taken outside shareholder meetings without the approval of all the shareholders, not just those controlling a majority of the votes.

15. *Integration.* In comparing BCI with Weiss, we have considered whether BCI's integration position is sufficient to overcome the negative effect of the attribution of Fernandez' media interest and conclude that it is not. Emmett DePoy, BCI's president who controls almost ninety-one percent of the voting rights, will be integrated full-time at the station. DePoy has lived in the service area almost all of his life and has intermittently been a member of local civic or business organizations. BCI Ex. 1, pp. 5, 9-10, although some of these memberships are remote in time. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109-10 para. 6 (Rev. Bd. 1984) (credit diminished by remoteness in time), *review denied*, 100 FCC 2d 941 (1985), *accord*, *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 para. 10 (1991). DePoy was a member of the Carmel/Clay Kiwanis Club from 1973-76, a member of the Noblesville

Elks Lodge from 1979-80 and from 1987 to the present (he served on the regional committee to promote a fund raising event in 1985), and a member of the Carmel and Noblesville Chambers of Commerce from 1987. He served on the Committee for the Noblesville on the River Festival from 1988-89. *See Oliver Kelley and Mary Ann Kelley*, FCC 91R-110, slip op. at 5 para. 20 (Rev. Bd. released Dec. 16, 1991) (postfiling civic involvements are accorded little weight). More than twenty years ago, he served on a Conference of Cities Committee that arranged accommodations and schedules for out-of-town visitors to Indianapolis, BCI Ex. 1, p. 9. *See Linda Crook*, 3 FCC Rcd 354 para. 5 (Rev. Bd. 1988) (an activity occurring more than 20 years ago is too remote to be meaningful).

16. In contrast, Weiss is entitled to 100 percent quantitative integration credit for Ms. Weiss' proposed full-time management role at the station. Ms. Weiss, like DePoy, receives credit for her long-term residence (since 1972), but she has had greater and continuous civic involvement in a wider range of activities since 1973, indicating a greater overall knowledge of and interest in the community than DePoy. *See Ronald Sorenson* at 1953 para. 11; *see also Policy Statement*, 1 FCC 2d at 396. Ms. Weiss' activities include: membership in the Indiana Chapter of American Women in Radio and Television which, among other service area activities, supports a community child care crisis center (she held leadership positions in 1981-82, 1982-83, 1984-85, was president from 1986-87, served on the charity fund raising committee from 1985-87 and chaired it in 1988 and 1989); active membership on the St. Margaret's Hospital Guild since 1985; current membership on the Board of Directors of Girls Clubs of Greater Indianapolis; and membership on the United Way of Greater Indianapolis' Fund Raising Team in 1988. She also chaired the Old Time Radio Fundraiser for St. Mary's Child Care Center in 1984 and served on the committee in 1983. She promoted the Broadripple Art Fair for the Indianapolis Art League in 1984 and, in 1988, worked with the Noblesville Chamber of Commerce for broadcast promotion of the Noblesville on the River event. Weiss Ex. 2, pp. 3-6. *See Initial Decision* at 3579 para. 27. *See also Oliver Kelley and Mary Ann Kelley, supra*, (post-filing civic activities are accorded little weight). Although DePoy has lived in the area longer than Ms. Weiss has, any advantage accruing to DePoy for length of residence is outweighed by Ms. Weiss' substantial advantage for civic activities. Thus, in the overall

not always been treated the same as attributable interests for multiple ownership purposes. Because of its concern that comparative selections of broadcast licensees favor those with no other media interests or fewer other interests than other applicants, the Commission has been more inclusive in what it considers relevant for diversification than it has for multiple ownership attribution. *See, e.g., Doylan Forney*, 5 FCC Rcd 5423, 5427 para. 30 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. Oct. 7, 1991); *Woods Communications Group*, 6 FCC Rcd 3529, 3533 n. 4 (Rev. Bd. 1991). *Daytona Broadcasting Company, Inc.*, 103 FCC 2d 931, 934-35 (1986), was notable because it excluded from diversity analysis those passive interests that had been excluded from attribution for multiple ownership purposes. Until *Daytona*, even the media interests of passive owners had been weighed adversely in the comparative diversity analysis. The Commission has clearly stated the value of the diversification objective in comparative proceedings:

Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.

*Policy Statement*, 1 FCC Rcd at 394.

<sup>9</sup> A significant interest in a network also carries diversification ramifications. *See generally Policy Statement*, 1 FCC 2d at 394; *Ronald Sorenson*, 5 FCC Rcd 3144, 3149 n. 15 (Rev. Bd. 1990), *modified on other grounds*, 6 FCC Rcd 1952 (1991). During oral argument, counsel for BCI advised the Board that, "There is no evidence that [BCI's AM station] didn't [carry Wabash network programming]," although questions were asked on that point. Tr. 804. There also is no showing that BCI would not carry Wabash network programming on the FM station if awarded the license.

comparison, Weiss is entitled to a significant enhancement credit on the local residence factor. See *Ronald Sorenson, supra*.

17. BCI is entitled to enhancement credit for the past broadcast experience of DePoy, who has spent virtually his whole career in broadcasting in both management and non-management positions. Ordinarily, this enhancement would carry less weight than the strong credit given for the local residence enhancement, see *Policy Statement at 396, Swan Broadcasting Limited*, 6 FCC Rcd at 21 para. 17, or the lesser female gender preference to which Weiss is entitled. See *Swan*. However, BCI also claims credit for substantial participation in management at its daytime-only station WYIC in Noblesville. This would upgrade the value of its broadcast experience credit to that of local residence. *Availability of FM Broadcast Assignments*, 101 FCC 2d at 645 para. 20.<sup>7</sup>

18. To be eligible for this enhanced credit, BCI must, among other factors,

demonstrate that members of the entity holding cognizable ownership interests spent more than 20 hours per week (either individually or in the aggregate) participating in the management of the daytime-only facility during the three-year period.

*Availability of FM Broadcast Assignments*, 59 RR 2d at 1229 para. 22. The three-year period is the three continuous years before filing the FM application. *Id.* at 1230 para. 23. BCI bases its claim to the preference on the successive participation of BCI President James Mathis from March 1, 1985 to May 20, 1986 (17.2 % voting stockholder until his death in 1986), BCI Vice President and then President Julio Fernandez from May 20, 1986 to January 1, 1987 (no stock interest during this time), and BCI President and then Vice President Emmett DePoy from January 1, 1987 to March 1, 1988 (15.5 % voting stockholder during that time). BCI Ex. 1, Tab. I. Weiss argues that BCI cannot receive credit for an owner who died during the three-year period or for an officer who worked at the station but did not have an ownership interest until later. We disagree. The preference is available to the AM licensee/FM applicant, *i.e.*, BCI. It runs with the applicant rather than the individuals who worked at the applicant's AM station, see *Availability of FM Broadcast Assignments*, 59 RR 2d at 1229 para. 21, and is awarded when members of BCI holding cognizable ownership interests under the Commission's attribution rules, including officers and directors, meet the required showing of participation at the AM station, either individually or in the aggregate, and the other criteria are met.

*Id.* at para. 22. Thus, BCI can aggregate the participation of those whose interests are attributed to it over the three year period in making its showing of entitlement to the enhancement.

19. No one disputes that Fernandez and DePoy worked at the station at least 20 hours a week during the periods claimed for them. However, Weiss questions whether BCI has made an adequate showing with respect to the time Mathis spent at the AM broadcast station before he died. In his findings on the AM preference issue, the ALJ had referenced only the hearsay testimony of DePoy who did not personally observe Mathis' work at the station during the period relevant to the AM preference. However, the record includes Fernandez' testimony that he worked with Mathis during the relevant period and observed that Mathis spent about fifty hours each week working for BCI. "All told, he spent about half his overall time on WYIC and half on syndication matters." BCI Ex. 2, p. 2. This un rebutted testimony is sufficient to establish that Mathis' participation satisfied the minimum time requirement for the period during which BCI is relying on Mathis' work at the AM station.

20. BCI meets the other criteria for the daytimer preference and, thus, is entitled to the enhanced preference for past broadcast experience available to applicants who also operate a daytime AM station in the same community as the proposed FM station.<sup>8</sup> Ms. Weiss, who has past broadcast experience in sales and as an account executive since 1979, has no management experience and no claim to the enhanced AM daytimer preference. See *Initial Decision* at 3579 para. 28. Thus, her very minimal enhancement under the broadcast experience factor is substantially outweighed by BCI's credit.

21. *Conclusion*. In the final analysis, however, Weiss is a stronger applicant than BCI. It has no diversification demerit, and it is 100 percent integrated. BCI has a diversification demerit from Fernandez' positions at BCI and Wabash, and it is not quite ninety-one percent integrated.<sup>9</sup> Although BCI claims a dispositive integration enhancement from its daytimer AM preference, this is not sufficient to overcome Weiss' superior quantitative integration with its superior local residence and its gender enhancement and BCI's diversity demerit.<sup>10</sup>

22. Weiss also is comparatively superior to both Bible and Umberger. Bible has substantial broadcast interests for which it receives a diversification demerit, and it does not propose to be integrated. See *Initial Decision* at 3579 paras. 23-24, 3584-85 paras. 71-72. Umberger proposes to be fully integrated into the management of the station, see *id.* at 3581, paras. 45-47, but his promise to move to Noblesville if he wins is "accorded less weight" than Ms.

<sup>7</sup> BCI is entitled to the credit to the extent that it is integrated, *i.e.*, to the extent of DePoy's participation as an owner in the FM station's management. *Availability of FM Broadcast Assignments*, 101 FCC 2d at 646 n. 14.

<sup>8</sup> Applicants must also propose integration of ownership into the management of the FM station and must promise to divest the AM station within 3 years from the commencement date of program test authority. *Availability of FM Broadcast Assignments*, 101 FCC 2d at 646 paras. 21-22.

<sup>9</sup> The nine percent disparity between BCI and Weiss is relevant but, by itself, is not decisional. Compare *Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981) (12.5 percent quantitative difference is significant enough to warrant a slight preference regardless of qualitative enhancements), with *Meiro*

*Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 para. 9 (1987) (a difference of about three percent is not significant) (subsequent history omitted).

<sup>10</sup> Weiss has questioned the bona fides of BCI's ownership structure as it applies to both BCI's quantitative integration claim and its claim to an AM daytimer preference. Weiss also has asked for air hazard and real-party-in-interest issues against BCI. Each of these points is mooted by the disposition here. With respect to the real-party-in-interest issue, we note the ALJ's finding that the issue would be necessary if BCI were a comparative contender in this case. *Initial Decision* at 3584 para. 70. Thus, if BCI could otherwise prevail, further hearing might be necessary. Cf. *Sunshine Broadcasting, Inc.*, 6 FCC Rcd 5981, 5984 para. 18 (Rev. Bd. 1991).

Weiss' enhancement for long-term local residence and civic activities. *Policy Statement*, 1 FCC 2d at 396. His past broadcast experience, although superior to Ms. Weiss', also does not carry the weight of her local residence enhancement. *See id.* (local residence has great significance but past broadcast experience has only "minor significance" in the comparative integration analysis).<sup>11</sup>

23. ACCORDINGLY, IT IS ORDERED That the Petitions for Leave to Amend filed by Bible Broadcasting Network, Inc., on July 22, August 26, October 7, November 7, and December 20, 1991, ARE GRANTED and the amendments ARE ACCEPTED.

24. IT IS FURTHER ORDERED That the Petitions for Leave to Amend filed by Broadcast Communications, Inc., on July 19 and August 1, 1991, ARE GRANTED and the amendments ARE ACCEPTED for informational purposes and that the Petition for Leave to Amend filed by Broadcast Communications, Inc., on October 11, 1991, IS GRANTED and the amendment IS ACCEPTED.<sup>12</sup>

25. IT IS FURTHER ORDERED That the application of Weiss Broadcasting of Noblesville, Inc. (File No. BPH-880301MQ) for a construction permit for a new FM station at Noblesville, Indiana, IS GRANTED; and that the applications of Bible Broadcasting Network, Inc. (File No. BPH-880301ML), Broadcast Communications, Inc. (File No. BPH-880301MZ), and Ben L. Umberger (File No. BPH-880301PD) ARE DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene  
Member, Review Board

<sup>11</sup> Our decision here moots the issues raised regarding the diversification demerit that the ALJ gave Umberger for failing to provide evidence "about any media interests," *Initial Decision* at 3585 para. 72, and the full integration credit he gave Umberger who has a pending application for a new FM station in Chandler, Indiana. *Id.* at 3584-85 para. 71.

<sup>12</sup> BCI filed a petition to amend its application by substituting a new transmitter site after the tower on its previous site was

sold and dismantled. The Mass Media Bureau filed comments stating that the amendment meets the appropriate technical standards. BCI has demonstrated good cause, and its amendment is accepted. *See Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).