

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

MM Docket No. 90-48

In re Applications of

LONE CYPRESS RADIO File No. BPH-880210ML
ASSOCIATES, INC.

HIGHLANDS File No. BPH-880211MK
BROADCASTING CO., INC.

PASO HONDO File No. BPH-880211ML
BROADCASTING LIMITED
PARTNERSHIP, A CALIFORNIA
LIMITED PARTNERSHIP

STODDARD JOHNSTON File No. BPH-880211MM
and SHERRIE
McCULLOUGH d/b/a J & M
BROADCASTING COMPANY

For Construction Permit for a
New FM Station, Channel 238A,
in Carmel, California

Appearances

John B. Kenkel, Esquire, and *Scott Cinnamon, Esquire*, on behalf of Lone Cypress Radio Associates, Inc.; *Patricia A. Mahoney, Esquire*, *Lawrence N. Cohn, Esquire*, and *Carey S. Tepper, Esquire*, on behalf of Highlands Broadcasting Co., Inc.; *Vincent J. Curtis, Jr., Esquire*, on behalf of Patricia A. Mahoney and Frank R. Jazzo, witnesses for Highlands Broadcasting Co., Inc.; *James A. Gammon, Esquire*, on behalf of Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership; *Harry P. Warner, Esquire*, *Mark E. Fields, Esquire*, *Jerrold Miller, Esquire*, and *John S. Neely, Esquire*, on behalf of Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company; and *Gary P. Schonman, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF ADMINISTRATIVE
LAW JUDGE JOSEPH STIRMER

Issued: January 7, 1992; Released: January 14, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order (HDO)*, 5 FCC Rcd 983, released February 22, 1990, the Chief, Audio Services Division designated for hearing eight mutually exclusive applicants for a new FM station on Channel 238A at Carmel, California. Four applicants remain.¹ They are: Lone Cypress Radio Associates, Inc. (Lone Cypress); High-

lands Broadcasting Co., Inc. (Highlands); Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership (Paso Hondo); and Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company (J&M).

2. The HDO specified the following issues:

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

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

3. A prehearing conference was held on April 30, 1990. Hearing sessions on the comparative issue were held on July 30 and 31, 1990, and August 1 and 2, 1990. At the August 2 hearing session, the record was closed except for an exhibit relating to the testimony of Alan P. Schultz. (Tr. 1214.) That exhibit (Joint Ex. 3) was received into evidence by *Order*, FCC 90M-2699, released August 28, 1990.

4. The applicants submitted proposed findings of fact and conclusions of law on October 30, 1990. Reply findings were submitted on November 16, 1990. Thereafter, as a result of petitions to enlarge issues, additional issues were added to this proceeding. Specifically, by *Memorandum Opinion and Order* of the the Presiding Judge, FCC 90M-3653, released November 19, 1990, the following issue was specified against Highlands:²

To determine whether Alan P. Schultz is a real party-in-interest in the application of Highlands Broadcasting Co., Inc. (Highlands) and, if so, the effect thereof on Highlands' qualifications to be a Commission licensee.

5. Hearing conferences were held on December 13, 1990, and February 28, 1991, and further hearing sessions were held on March 4, 5, and 7, 1991. The record was again closed on March 7, 1991.

6. Proposed findings and conclusions on the added issue were filed by Highlands and Lone Cypress on April 10, 1991; and reply findings were filed by Highlands and Lone Cypress on April 24, 1991.

FINDINGS OF FACT

LONE CYPRESS RADIO ASSOCIATES (Lone Cypress)

Structure

7. Lone Cypress is a California for-profit corporation established in 1988. The three principals of Lone Cypress are Mr. L. E. (Eddie) Johnson, Jr., Ms. Judith Oates, and Ms. Olivia Alvarado. Each holds 250 shares of stock representing a 33 1/3 percent voting interest. Each is a member of the board of directors. Mr. Johnson is president. Ms. Alvarado is vice-president and chief financial officer, and Ms. Oates is vice-president and secretary. (Lone Cypress Ex. 1.)

Integration

L. E. Johnson, Jr.:

8. Eddie Johnson will serve full time as general manager of the new FM facility. His duties will include primary responsibility for long-term planning, ultimate fiscal responsibility, and implementation of the EEO program with the help of Ms. Oates who obtained the sources and filled out that portion of the application. (Tr. 399-400, 438; Lone Cypress Ex. 1, p. 1.) He will also hire an engineer and supervise the engineering at the station. (Tr. 401, 408.) Mr. Johnson will have ultimate responsibility for everything that goes on at the station, relying on input from Ms. Oates and Ms. Alvarado in the implementation of station policies and management practices. (Tr. 407; Lone Cypress Ex. 1, p. 2.) Mr. Johnson also expects to spend at least 50 percent and up to 70 percent of his time selling advertising time for the station. (Tr. 408-410.) During the time he devotes to sales, Mr. Johnson will be on the street, on the phone, or doing mailing. (Tr. 409.) In addition, Mr. Johnson may host the station's weekly public affairs program. (Tr. 412-413.)

9. Mr. Johnson is the President, General Manager, and 25 percent stockholder of Carmel Food and Beverage Company (CFBC), which owns and operates the Fabulous Toots Lagoon Restaurant in Carmel. (Tr. 424; Lone Cypress Ex. 2, 1.) He spends about 25-30 hours per week in his positions with CFBC. (Lone Cypress Ex. 2, p. 1.) He does not intend to sell his interest in CFBC if the Lone Cypress application is granted. (Tr. 423-424.) According to Johnson, a full staff is in place at the restaurant including an executive chef and a manager. Johnson has trained these people and believes the restaurant will be able to run without his direct supervision. (Lone Cypress Ex. 2, p. 1.)

10. From December 1970 until July 1975, Mr. Johnson resided within the city limits of Carmel-By-The-Sea. (Lone Cypress Ex. 2, p. 1.) For the past 15 years, his residence has been just "a couple of hundred yards" outside the city limits. (Tr. 423.) He is or has been involved with the Monterey Peninsula Chamber of Commerce, the Carmel Business Association (Board of Directors and Program Committee), the Monterey Peninsula Hospitality Association (member, Board of Directors) and the mayoral campaign of Eleanor Laiolo in Carmel. Mr. Johnson has been a businessman in Carmel-By-The-Sea for the past 20 years and, as previously noted, is presently the President and General Manager of the Carmel Food and Beverage Company, which owns and operates the Fabulous Toots Lagoon Restaurant. (Lone Cypress Ex. 2, pp. 1-2.)

11. From 1970 though 1977, Mr. Johnson was the President, General Manager and 28 percent shareholder of Monterey Bay Area Media, which was the licensee of KLRB-FM, Carmel, California. (Lone Cypress Ex. 2, p. 1.)

Judith Oates:

12. Ms. Oates, a female, proposes to work full time as the Station Manager. She will work with Mr. Johnson to oversee the day-to-day operations of the station and will serve as the station's Community Services Director and Promotions Director. (Lone Cypress Ex. 1, p. 2.) She will also work closely with the sales department and will spend about 50-60 percent of her time working in sales. By "sales," she means making sales calls in person or by phone. (Tr. 437.) She will spend approximately 20 percent of her time in production work, supervising the formation of a weekly public affairs show and serving as

an on-air person. (Tr. 413, 417.) Ms. Oates will also oversee implementation of the station's EEO program that she helped formulate. (Tr. 438.)

13. Except for a one-year period when she resided in Washington, D.C., Ms. Oates has always resided in Monterey County. She lived in Prunedale, California, in Monterey County during 1978-1986. Her most recent residence, for the past four and one half years, has been in Salinas. (Lone Cypress Ex. 3, p. 1.)

14. Ms. Oates has been involved in the following activities: Member of the Salinas Valley Memorial Hospital Auxiliary as a candy striper (1961-1963); board member of the Advertising Club of the Monterey Peninsula (1983-1987); Auxiliary of Planned Parenthood of Monterey County (1983-1986); Advisory Board of Salinas Adult School (1982-present); Advertising Chair for the California International Air Show (1985); Fundraising Committee of the Steinbeck Treatment Centers (1987); Publicity Director for the California Rodeo (1977-1983); Colmo del Rodeo Parade (1983-1985); Alumnae Board of the Santa Catalina School (1971-1980); Monterey Peninsula March of Dimes and Gourmet Gala (1985); Salinas Chamber of Commerce (1969-present); and Hartnell College Community Chorus (1970-1980). (Lone Cypress Ex. 3, pp. 1-2.)

15. Ms. Oates is employed at KSMS-TV, Monterey, California, in sales. She plans to terminate her employment there in the event the Lone Cypress application is granted. Ms. Oates took classes in the Radio/TV Department at San Francisco State University, and her professional broadcast career started in 1966 when she worked in production and served as live talent at KSBW-AM/FM/TV. She was full time until 1968, then started part time in 1969 and remained there until 1977. Between 1968 and 1969, Ms. Oates worked in the production and accounting departments at KTOM-AM. She became an account executive for KWAV-FM, Monterey, California, in 1983 and stayed until 1987 when she took on a similar position at KOCN-FM, Pacific Grove, California, where she stayed until she accepted the position at KSMS-TV. In 1987, she was elected "Media Person of the Year" by the Advertising Club of the Monterey Peninsula. (Lone Cypress Ex. 3, p. 1.)

Olivia Alvarado:

16. Ms. Alvarado will be the full-time Sales Manager for the station, and her primary responsibility will be to manage the sales staff. (Lone Cypress Ex. 1, p. 3.) Although proposed as the Program Director in an integration and diversification statement, Ms. Alvarado will not really serve in that capacity. (Tr. 483-487.) The three stockholders will hire a program director, and Alvarado will oversee that department. (Tr. 456-457.) Ms. Alvarado will spend considerable time making sales calls, about 60 percent of her time.³ (Tr. 468.) Mr. Johnson and Ms. Oates will also sell for the station. (Tr. 409, 437.)

17. Ms. Alvarado, a Hispanic-American, was born and reared in Monterey County and graduated from Salinas High School in 1971. After that, she left the county to live in the San Francisco Bay area and returned to Monterey County in 1985. Since then, she has been a member of, and involved with, the Monterey Peninsula Chamber of Commerce, the Seaside Chamber of Commerce (Community Affairs Group), the Pacific Grove Chamber of Commerce (Fund Raising), the Salinas YMCA, the Communicators of Monterey Peninsula, and the Advertising

Club of Monterey Peninsula. (Lone Cypress Ex. 4.) Employers paid her dues for the Salinas Chamber of Commerce, the Pacific Grove Chamber of Commerce, the Monterey Chamber of Commerce, and the Monterey Peninsula Ad Club. (Tr. 435, 465-466.)

18. Ms. Alvarado will terminate her other employment to meet her full-time commitment to the Lone Cypress FM station. Effective August 21, 1990, after the hearing, Ms. Alvarado started a job at KCU-TV, a Spanish television station operating on Channel 15 in Salinas, California. She had been employed as an account executive at KDOS-FM, Fremont, California, first, then KDON-FM, Salinas, California, KOCN-FM, Pacific Grove, California, and most recently KWAV-FM, Monterey, California until July 27, 1990. (Tr. 461-463; Lone Cypress Ex. 1, p. 3; Ex. 4.) By amendment filed on November 7, 1990, and accepted by Memorandum Opinion and *Order* of the Presiding Judge (FCC 90M-3868) released December 7, 1990, it was reported that Ms. Alvarado left the employ of KCU-TV and accepted new employment with KSMS-TV, Monterey, California.

Diversification

19. Lone Cypress holds no other interest in any other media of mass communications or related businesses. Individually, neither Ms. Oates nor Ms. Alvarado hold any ownership interest in any other media of mass communications. However, Mr. Johnson is an officer, director and 35 percent shareholder in Lahaina Broadcasting Co., Ltd., a corporate general partner of KPOA Radio, and, individually, is a general partner in KPOA Radio.⁴ KPOA Radio is the licensee of Class A FM Station KPOA, Lahaina, Hawaii. (Tr. 402-404; Lone Cypress Ex. 1.) During the formative stages of the station (1983-1985), Mr. Johnson made several trips to Hawaii. Now, the number of trips he takes has diminished and his duties as the financial officer include no day-to-day functions. He reviews financial statements, attends an annual board of directors and shareholders meeting, and consults, by phone, concerning station business, three or four times a month. (Tr. 403, 411.)

Auxiliary Power

20. Lone Cypress will provide auxiliary power at the studio and transmitter locations. (Lone Cypress Ex. 5.)

HIGHLANDS BROADCASTING CO., INC. (Highlands)

Structure

21. Gilbert Wisdom (Wisdom) is the sole officer and director of Highlands, and he owns 100 percent of its stock (*i.e.*, 1,500 shares). (Highlands Ex. 1, p. 1.)

Integration

22. If the Highlands application is granted, Wisdom proposes to work at the station as full time general manager. In that capacity, he will have ultimate authority and responsibility for all departments at the station, and he will have ultimate responsibility for establishing and implementing all station policies and procedures. (Tr. 501-502; Highlands Ex. 1, p. 1.)

23. Since January 1987, Wisdom has lived within the principal city contour of Highlands' proposed station. From January 1986 to January 1987, Wisdom lived within

the Carmel city limits. In the event Highlands' application is granted, Wisdom proposes to move within the city limits of Carmel. (Highlands Ex. 1, pp. 1-2.)

24. Wisdom seeks credit for being both a Hispanic and an American Indian. His Hispanic claim is based upon representations that he is one-eighth Hispanic (Mexican) heritage by blood, and that he has a functional knowledge of the Spanish language, owns a 50 percent ownership interest in a home in Mexico, and contributes to charitable activities in Mexico. (Highlands Ex. 1, p. 2.) He has never visited the place in Mexico from which he claims his Mexican ancestor emigrated. He can speak some Spanish, but is not fluent in the language. For relaxation, he visits property which he and his ex-wife own in Tijuana, Mexico. (Tr. 494, 530.) When in Tijuana, he drops off clothing at an orphanage supported by a Los Angeles-based organization, Los Hambriados. (Tr. 530.) Wisdom has not retained full membership in Los Hambriados since 1980, when he ceased participating in its formal activities, but he continues to make contributions to the orphanage. (Tr. 526.) In 1990, he contributed \$50 and some clothing. (Tr. 533.) Wisdom is not a Hispanic surname. (Tr. 682-683.)

25. Wisdom's American Indian claim is based on representations that he is one-eighth American Indian (Cherokee) by blood. He acknowledges that he is not and has never been active in Indian civic activities and has never made substantive affirmative steps to participate in or to associate with an Indian heritage. (Highlands Ex. 1, p. 2.) He does not speak any Native American dialects. He has never visited Cherokee reservations. He does not contribute money to any American Indian activities, nor subscribe to any magazines or newspapers published on behalf of American Indians. (Tr. 534-535.) He has never checked to see if he is on any tribal roll of the Cherokee nation. (Tr. 670.) He has never been issued a document from the Bureau of Indian Affairs identifying him as an American Indian. (Tr. 671.) Wisdom describes himself as "fair-complexioned" and thinks it unlikely that a stranger would identify him as either an American Indian or a Hispanic. (Tr. 683.)

26. Wisdom is a member of the Monterey Peninsula Chamber of Commerce (1985-present), member of the Ad Club of Monterey Peninsula (1986-1988),⁵ member of the board of directors of the Monterey Peninsula Jazz Orchestra (non-profit organization devoted to educating youth) (1989-present), and member of the Talent Advisory Committee, Monterey Blues Festival, non-profit organization devoted to youth programs in black community (1989). (Highlands Ex. 1, p. 3.)

Diversification

27. Wisdom owns 83.3 percent of Wisdom Broadcasting Company, Inc. (WBCI), licensee of Station KRML(AM), Carmel, California. (Tr. 504; Highlands Ex. 1, p. 3.) Wisdom's co-stockholder in WBCI is Alan P. Schultz (Schultz) who owns 16.7 percent of the company and is also a corporate officer and director. (Tr. 683-684.) The relationship between Schultz and Wisdom will be considered in greater detail under the real party-in-interest issue.

28. Schultz loaned Highlands \$1,500 which was evidenced by a Convertible Promissory Note dated February 4, 1988. The Note, payable on February 1, 1995, gave Schultz the right to convert the Highlands obligation into 1,500 shares of Highlands Class B common (non-voting) stock. (Tr. 509; Lone Cypress Ex. 6; Joint Ex. 3.)

pp. 43, 49.) This would have represented a 50 percent ownership interest. (Joint Ex. 3, p. 8.) Pursuant to Section 5 of the Note, Highlands (Wisdom) could not prepay the loan without the prior written consent and approval of Schultz. (Lone Cypress Ex. 6.) The Note remained outstanding until it was "Cancelled 6/25/90 as of 6/21/90" on advice of counsel, just days before Mr. Wisdom's scheduled deposition in this proceeding. (Tr. 542.) Highlands paid Schultz the amount due, plus interest, on June 21, 1990. (Tr. 510, 693; Joint Ex. 3, pp. 30-31.)

29. As noted, Wisdom owns 83.3 percent of WBCI, licensee of KRML in Carmel. Wisdom made a pledge to sever all connections with Station KRML and with the licensee of the station in Highlands' application as initially filed on February 11, 1988, if Highlands' application is granted. Wisdom remains committed to fulfilling that divestiture commitment. (Highlands Ex. 1, p. 4.)

30. Wisdom currently owns 20,000 shares of WBCI stock, and Schultz owns 4,000 shares. (J&M Ex. 4, p. 1.) Schultz loaned WBCI \$16,000, and the obligation to repay this loan is the subject of a Convertible Promissory Note dated October 1, 1985. (Lone Cypress Ex. 7.) The Note is outstanding at this time. (Tr. 519.) The Note allows Schultz to convert the WBCI obligation to him into additional shares of WBCI stock which represent 40 percent of the company (*i.e.*, 16,000 shares⁶). After the conversion, Schultz would own 50 percent of WBCI. (Tr. 519-521; Lone Cypress Ex. 7; J&M Ex. 4, Sections A and B.)

31. Wisdom and Schultz have a Buy-Sell Agreement dated July 1, 1985, regarding their interest in WBCI. The Buy-Sell Agreement restricts the transfer of shares by either shareholder by providing that no shares of WBCI may be transferred without providing written notice to WBCI and giving WBCI or the remaining shareholder the right to acquire the offered stock on the same terms and conditions as those in the proposed transfer. (Tr. 514; J&M Ex. 4, pp. 1-2.) They also executed an Amendment No. 1 to Buy-Sell Agreement dated February 4, 1988. (Lone Cypress Ex. 8, pp. 1-2.) Section 1.2 of that amendment defines an "FCC Mandated Divestiture Transaction" as "any disposition of an ownership interest in the Company required by the FCC as a result of either or both of the Shareholders acquiring, or proposing to acquire, an interest in any other radio station or any other media related activity." Under Section 1.1(a) of the Amendment, in the event of an FCC Mandated Divestiture Transaction, and the potential sale of stock of WBCI, Schultz is required to convert the amount then due on the \$16,000 WBCI note into shares of WBCI stock. (Lone Cypress Ex. 8, P. 1, Section 1.1(a).) At that point, Wisdom and Schultz are both required to "sell all of their shares to the prospective purchaser . . ." (Tr. 516; Lone Cypress Ex. 8, p. 1, Section 1.1(b).) In the event of a sale of WBCI's assets (rather than stock), Schultz is authorized by Section 2 of the Amendment to delay the conversion until after WBCI's assets have been sold.

32. According to Wisdom, the purpose of the amendment to the Buy-Sell Agreement was to assure that in the event of an FCC Mandated Divestiture Transaction (*e.g.*, the need to effectuate Wisdom's diversification commitment), Schultz would not be able to block a sale of the station. (Tr. 524-525.) Schultz also acknowledged that under the amendment, if Highlands' application were granted, both he (Schultz) and Wisdom were required to dispose of their interests in WBCI. (Joint Ex. 3, p. 50.)

Auxiliary Power

33. Highlands intends to install auxiliary power supply at both the proposed transmitter and the studio site. (Highlands Ex. 2.)

Real Party - in - Interest Issue

34. In 1985, Wisdom and Schultz formed WBCI, a California corporation, which acquired radio Station KRML-AM in Carmel, California. Wisdom's ownership interest in WBCI was, and has always been, 83.3 percent. Alan Schultz has always owned 16.7 percent of WBCI. (Highlands Exs. R-1, R-2.)

35. When Wisdom and Schultz purchased KRML-AM, Wisdom had no prior experience in broadcasting. Because of his inexperience, Wisdom regularly sought Schultz' advice and input regarding the day-to-day operations of KRML-AM during the approximately first 12 months of WBCI's ownership of the station. (Highlands Exs. R-1, R-2.) After his initial involvement in the management and operations of KRML-AM, Schultz gradually and continually became less involved in station operations. Between 1985 and the beginning of 1988, Schultz visited Carmel about 60 times. It was understood at the outset that Wisdom would manage KRML-AM, and that Schultz would continue the pursuit of his broadcast management career in the San Francisco area. (Highlands Ex. R-1, p. 1.) Since 1985, it was estimated that Schultz has worked only 100 days at KRML-AM. In the past two years, he has not worked there at all. Schultz has never drawn a salary from WBCI. Since the time WBCI purchased KRML-AM, Schultz never considered himself a day-to-day manager of the station. (Tr. 1598.)

36. KRML-AM has never turned a profit since WBCI purchased it in 1985. (Tr. 1602.) The station has been for sale since 1987. (Tr. 1467.) According to Schultz, he has wanted WBCI to sell the station for a long period of time. (Tr. 1602.) Schultz believes that the radio market of which Carmel is a part is over saturated. (Tr. 1596.)

37. As a result of a discussion between Wisdom and Schultz, the idea about seeking an FM channel at Carmel was formed. (Tr. 1594.) According to Wisdom, Schultz "gave birth to that idea" and, because Wisdom lacked experience in such matters, Schultz took the first step in asking KRML-AM's engineering consultant to perform an FM channel study. (Tr. 1416, 1594.) WBCI paid for the engineering study. WBCI filed a "Petition for Rule Making" requesting the allocation of Channel 238A to Carmel, California. (Tr. 545; Highlands Ex. R-1, p. 2; Highlands Ex. R-2, p. 1.) A *Notice of Proposed Rule Making*, 2 FCC Rcd 1521, was released March 11, 1987, and a *Report and Order (R & O)*, DA 87-1688, allocating the channel to Carmel was released on November 25, 1987. (Lone Cypress Ex. R-1.) Copies of the *R & O* were mailed by WBCI's attorney, Frank Jazzo, of Fletcher, Heald and Hildreth, to both Schultz and Wisdom.

38. On November 4, 1986, Frank Jazzo, attorney for WBCI, wrote a letter to Alan Schultz addressing the question of whether, with AM station KRML, WBCI would be entitled to the Commission's "AM Daytimer's Preference" in any FM comparative hearing for Carmel. Jazzo's conclusion was that WBCI would not qualify for the preference. (Lone Cypress Ex. R-2.) Mr. Jazzo prepared the letter in response to an inquiry from Mr. Schultz. (Tr. 1685.) It was Mr. Jazzo's policy to address his responses to inquiries to whomever made the inquiry. (Tr. 1687.) Ear-

ly on, in 1986, Schultz was in agreement with Wisdom that WBCI should pursue the FM allocation and when the FCC released its *R & O* allocating an FM channel to Carmel in November 1987, it was still WBCI's intention to file an FM application. (Tr. 1420-1421.)

39. As noted, initially it was the intention that the FM application for Carmel would be filed in the name of WBCI. However, according to Wisdom and Schultz, the plan to have WBCI file the application changed. One reason why WBCI did not pursue the FM application was its ineligibility for a Daytimer's Preference. (Tr. 1429-1431.)⁸ However, WBCI's ineligibility for a Daytimer's Preference was not a decisive factor as far as Schultz was concerned. (Tr. 1496.)⁹ Schultz had other business and personal reasons for not wanting to proceed with the FM venture. First, he reached the conclusion that the Carmel area is saturated with radio signals -- about 90 signals serve Carmel, half of which are FM's. Second, Schultz believed that there would be great competition for the Carmel FM facility, that the proceeding would be lengthy, and the costs of pursuing the facility would be prohibitively high. This he wanted no part of. According to Schultz, he tried to temper Wisdom's enthusiasm for applying for the FM facility, but to no avail. (Tr. 1505, 1596.) Finally, Schultz' time constraints, financial limitations, and promising broadcast management position with Douglas Broadcasting dissuaded Schultz from involving himself in the ownership or management of an FM facility in Carmel.¹⁰ Schultz acquired stock options in Douglas Broadcasting in May 1989. These options are conditioned upon continued performance criteria and have not been exercised as of yet. (Highlands Ex. R-2, p. 2.)

40. According to Jazzo, Wisdom and Schultz were equally interested in the FM allocation from the time the petition for rule making was filed by WBCI until late January 1988. The first time it became absolutely evident to Jazzo that an entity other than WBCI would be applying for the new FM station in Carmel was when he prepared a letter for Mr. Wisdom on January 29, 1988, which transmitted a draft of the FM application form to Wisdom with a copy to Schultz. The first two sentences of the transmittal letter are as follows: "Please find enclosed a draft of the Carmel FM application on FCC Form 301. Obviously, some information will need to be provided with respect to the new corporation." (Tr. 1688-1689, 1721; Lone Cypress Ex. R-5.) At that time, Jazzo did not know the name or composition of the new corporation. (Tr. 1719.)

41. According to Schultz, sometime in mid-1987, he informed Wisdom that he was no longer interested in pursuing the Carmel FM facility, but Wisdom places this conversation around Christmas of 1987. (Tr. 1498-1499.) Schultz told Wisdom that he did not want to detract from his existing employment duties with Douglas Broadcasting. (Tr. 1420.) According to Schultz, by the time the Highlands application was filed, he no longer had any interest in participating in that entity. (Tr. 1593.) It was Jazzo's understanding that Schultz would only participate as a lender and did not want any part of Highlands because he had no desire to participate in day-to-day operations. (Tr. 1700, 1709-1710, 1720.)

42. By December 1987, Wisdom had decided to apply for the FM facility alone. According to Wisdom, it was also understood at that time that Schultz might assist him solely as a lender, and that Schultz would have no role in

the preparation of the application, the proposed management of the station, or in any other aspect of the prosecution of the application. (Tr. 1450.)

43. The last conversation Jazzo had with Schultz regarding the Carmel FM application was in early February 1988. Wisdom was also conferenced into the conversation. The nature of the conversation was that Wisdom had decided to form Highlands and file an application under the Highlands name. Schultz indicated during this conversation that he had agreed to loan funds to Highlands. (Tr. 1691-1692.) Although Jazzo had subsequent conversations with Schultz regarding KRML-AM, from that point on (the conclusion of the early February 1988 telephone conversation), Jazzo believed that Schultz was merely a lender to Highlands. (Tr. 1699-1700, 1710, 1720.)

44. Dave Williams was the Highlands engineer, and he was retained by Wisdom. (Tr. 1448.) At the time Williams was preparing the engineering portion of what came to be the Highlands application, he assumed that both Wisdom and Schultz were principals of the applicant entity. At the time the Highlands application was being prepared, no one told him exactly who the principals of Highlands were. Thus, the fact that Schultz was sent copies of certain letters generated from Williams regarding Highlands was due to Williams' unawareness of the identity of Highlands' principal. (Highlands Ex. R-3, 2.)

45. Schultz had no role in the preparation of the Highlands application. All of the engineering services with respect to the Highlands application were billed to Highlands and subsequently paid by Highlands. With some assistance from the engineer, Wisdom prepared a cost of construction and initial operations budget. Wisdom contacted potential sources of financing and obtained written financial commitments from some of these people. (Highlands Ex. R-1, pp. 2-3.) Wisdom's wife, Judith Garber, has loaned Highlands money towards the prosecution of the application. (Tr. 1442, 1445; Lone Cypress Ex. R-4.)

46. Wisdom arranged for KRML-AM's communications counsel, Frank Jazzo, Esquire, to prosecute Highlands' application. With assistance from Jazzo and his associates, Wisdom prepared the FCC Form 301 application, secured the transmitter site, and set up the Highlands' public file. (Highlands Ex. R-1, p. 3.) Jazzo's law firm sent Highlands' retainer/fee agreement to Wisdom. (Tr. 1725.) Subsequently, it was Wisdom who terminated Jazzo and his law firm, and it was Wisdom who retained new counsel. (Tr. 1465.) Sometime around February 1988, Wisdom asked Schultz if he could serve as a possible source of funding for Highlands' application. Schultz subsequently agreed to assist Wisdom as a lender. (Highlands Ex. R-2, pp. 2-3.)

47. Schultz has made loans periodically to assist Wisdom in the prosecution of Highlands' application. The first such loan, in the amount of \$1,500, was made on February 4, 1988, and is evidenced by a Promissory Note with a convertible stock option. The facts relating to this Note are set forth in paragraph 28 of these Findings.

48. There is some conflicting testimony concerning whose idea it was to utilize a Promissory Note with the convertible stock option. According to Wisdom, the idea was germinated by Frank Jazzo's law firm, and that counsel then coordinated his efforts with Highlands' local California counsel. (Tr. 1480.) Wisdom was never told by Schultz that he wanted a convertible stock option, only that he wanted security. Wisdom thought that Frank Jazzo suggested the stock option. (Tr. 1469, 1471.)

49. Schultz does not recall how the Promissory Note came into being. (Tr. 1591.) He never made any suggestions as to what form of security he wanted, nor does he know why 1,500 shares of Highlands stock are referenced in the Note. (Tr. 1600.) Although instructions were given to the attorneys to create some written form of security, the specific structure of the Promissory Note was not Wisdom's idea. (Tr. 1482-1484.) Schultz believes that Wisdom talked to counsel and asked them how best to proceed to cover the loans Schultz would make. (Tr. 1574.) Although Frank Jazzo agreed that the Promissory Note was created because Schultz wanted security for his loans, Jazzo stated he believed that Wisdom, Schultz, and local counsel together came up with the stock convertibility idea. (Tr. 1696, 1711.) Nevertheless, Jazzo talked to local counsel about the Note and offered some language to be included so that the non-voting stock referred to in the stock option would provide proper insulation under the Commission's policies. (Tr. 1714.) As far as Schultz was concerned, the Note itself would have been sufficient to provide the security he wanted. He did not create the structure of the Note, but when Wisdom presented it as the form of security for the Schultz loans, he didn't argue with it. (Tr. 1576-1578.)

50. In addition to the first loan made by Schultz to Wisdom, which was secured by the Promissory Note and convertible stock option previously discussed, Schultz later made other loans to Highlands. These loans were made on a "handshake" basis without any security. Specifically, Schultz loaned Highlands \$100 on October 5, 1989; \$1,650 on April 26, 1990; and \$5,000 on May 10, 1990. (Tr. 1438; Lone Cypress Ex. R-3.)¹¹ Repayment terms for the other three outstanding "handshake" loans were neither discussed nor were the loans memorialized, except for the check stubs in Mr. Schultz' checkbook. (Tr. 1582-1583.)

51. At the suggestion of Schultz, the Promissory Note was cancelled on June 25, 1990. (Tr. 1584-1585; Lone Cypress Ex. 6.) When Highlands obtained new counsel, counsel reviewed the documentation and suggested, through Wisdom, that the Note was going to be misinterpreted in the comparative process, in a way that could be detrimental to the application. Due to the opinion of Highland's new counsel, Schultz suggested that the debt be paid off, with interest, pursuant to the terms within the Note. Wisdom agreed to do this. (Tr. 1585; Highlands Ex. R-1, p. 4.)

52. Sometime prior to or around the time of the filing of Highlands' application, Wisdom, Schultz and Ed Hogan or Eddie Johnson attended an informal settlement meeting in a Carmel area restaurant, the entire agenda of which was unknown to Schultz prior to his arrival there. At that time, there was a discussion of a possible merger structuring of certain Carmel FM applicants. The proposed plan included combining the FM operations with KRML-AM. Schultz did not participate in any of the discussions regarding the terms of the merger as between the FM applicants. The extent of Schultz' participation was limited to the scenario which would combine the operations of KRML-AM with the new FM station. Because Schultz is part owner of KRML-AM, he was directly affected by the deal and, thus, attended the meeting. (Tr. 1463; Highlands Ex. R-2, p. 3.)

**PASO HONDO BROADCASTING LIMITED
PARTNERSHIP, A CALIFORNIA LIMITED
PARTNERSHIP (Paso Hondo)**

Structure

53. Paso Hondo is owned 20 percent by its sole general partner, Kenneth Hildebrandt, and 80 percent by its sole limited partner, George Newhart. (Paso Hondo Ex. 1.)

Integration

54. Paso Hondo does not propose any integration. (Paso Hondo Ex. 1.)

Diversification

55. Neither Paso Hondo nor its principals have any attributable interests in any medium of mass communications. (Paso Hondo Ex. 1.)

**STODDARD JOHNSTON and SHERRIE McCULLOUGH
d/b/a J & M BROADCASTING COMPANY (J & M)**

Structure and Organization

56. J&M is currently a general partnership. Stoddard Johnston (Johnston) and Sherrie McCullough (McCullough) are each 50 percent general partners in J&M. (Tr. 727; J&M Ex. 1.) J&M operated under an oral partnership agreement from on or about January 5, 1988, until on or about May 1, 1990, when the partnership agreement was reduced to writing and executed by Johnston and McCullough. However, Johnston and McCullough intend to form a corporation which will be the permittee/licensee of the station, which they will own on a 50/50 basis. (Tr. 730-731.) It has always been their intention to operate their station in the corporate form. (Tr. 759, 806.)

57. Johnston was informed of the availability of the FM channel in Carmel by his counsel. (Tr. 722.) He called McCullough, whom he had known for more than ten years, and asked her if she would be interested in joining with him in applying for the station. (Tr. 722-723, 725.) McCullough has been married for ten years to Tom McCullough, a stock broker. (Tr. 725.) Johnston and McCullough met together with their respective spouses on January 5, 1988, and discussed this opportunity. (Tr. 723.) McCullough was interested, and within the next few days agreed to join Johnston in a partnership to prepare and file the application. (Tr. 723-724.) Prior to coming to an agreement, Johnston had briefed McCullough on the application process and his estimate of the total expenses, including construction and first three months operating costs. (Tr. 725-726, 735.) Ms. McCullough has kept Mr. McCullough informed of the project because, as a married person, she wanted to get some sort of feeling from her spouse to go ahead with a project of this type. (Tr. 810.) Sherrie McCullough will rely on community property for her financial contributions to the application, although she believes she has sufficient assets in her own name to cover construction and prosecution costs. (Tr. 804, 840, 842; Cal Tower Ex. 14.) At deposition, Ms. McCullough testified that she looked upon the application as a joint effort with her husband, but clarified this to mean only financially. (Tr. 833; Cal Tower Ex. 14.)

Integration

Stoddard Johnston:

58. Johnston will serve as the General Manager of the proposed station working full time on a daily basis -- a minimum of 40 hours per week. (Tr. 737; J&M Ex. 2, p. 1.) Johnston will have overall responsibility for all aspects of the proposed station's operations including the shaping of entertainment, news and public affairs programming. He will have overall responsibility for the hiring, firing, and supervision of station personnel except the sales department; this includes the hiring, firing, and supervision of on-air personnel and production personnel. Johnston will hire a program director who in turn will hire, fire, and supervise on-air and production personnel with Johnston's input and approval. Johnston will make sales calls and from time to time will accompany other sales employees on their sales calls. Johnston will have overall responsibility for the station's budget and developing station policies. (J&M Ex. 2, p. 1.)

59. Johnston presently has no business commitments. He will resign any employment he may have before the Carmel station begins broadcasting, so as to be completely free to devote full time to the station. (J&M Ex. 2, p. 1.)

60. Johnston has resided in Carmel, California, from 1964 through 1988, when he moved to Pebble Beach, California. Pebble Beach is in the unincorporated area of Monterey County and is immediately adjacent to Carmel. His home is approximately one mile from the Carmel city limits. For the past 26 years he has resided within the proposed 70 dBu contour of the proposed station. (J&M Ex. 2, p. 1.)

61. Johnston began working in the engineering department of WCHS(AM), Charleston, West Virginia, in 1937 and remained there until 1941. He was the business manager of Ivy Network in New Haven, Connecticut, from 1947 to 1948 while attending college, and from 1949 to 1950 was the Chairman of Yale Broadcasting Company, owner of WYBC(AM) in New Haven. Between 1950 and 1951, he was an account executive at WTAM(AM)/WNBK(TV), Cleveland, Ohio. From 1954 to 1958, he was general sales manager of KLX(AM), Oakland, California; and from 1958 to 1961, account executive for station KTVU(TV) in Oakland. Between 1961 and 1964, he was president and general manager of KRGV-AM-TV in Weslaco, Texas. While in Monterey, California, from 1964 to 1968, Johnston maintained the title of both president and general manager at KMBY(AM); and he was president and general manager at KWAV(FM), Monterey, California, from 1966 to 1975. In 1975 and up until 1980, he continued to hold the title of general manager at KWAV(FM) in Monterey, California; and from 1981-1985, he was president and general manager of KMBY(FM) in Seaside, California. (J&M Ex. 2, pp. 2-3.)

62. Johnston has served as president of the Society for the Prevention of Cruelty to Animals of Monterey County from 1986 to date, devoting six hours per week to that organization. He has been on the board of directors since 1967 and has served as president of Pacific Grove-Asilomar Operating Corporation since 1974, devoting about six hours per week to that activity. Asilomar is owned by the California Department of Parks and Recreation and is a low-cost, self-supporting public conference and meeting center, hosting more than 200,000 people yearly. (J&M Ex. 2, p. 3.)

63. Johnston has also been a member (ad hoc) of the Advisory Council of the Monterey County Symphony in Carmel, California, from 1976 to the present, devoting three hours per year, but none recently. He is also a member and past director of the Monterey Peninsula Rotary Club since 1966 to the present; a member of the Carmel Business Association; and a board member of the Monterey Peninsula Chamber of Commerce. He devotes almost no time to these organizations at the present time. (Tr. 742-743.) He is past board member of the Community Foundation for Monterey County and served as its president for two terms during the years 1978 through 1984, working six hours per week. (J&M Ex. 2, p. 4.)

64. From 1980 to 1984, Johnston was board member of Economic Development Corporation of Monterey County, working four hours per week, and serving as its first president. He continues to attend monthly meetings of this group. He was also past board member of the Monterey Bay Girl Scout Council, serving two terms as its president from 1968 to 1974. He also was a board member of the Monterey Peninsula Museum of Art and held board membership to Monterey County Red Cross for two terms, from 1966 through 1970. (J&M Ex. 2.)

65. Johnston retained J&M's attorney, selected the engineer, obtained permission to use the transmitter site, established the local public file, and receives all bills for the partnership. (Tr. 767, 803, 812, 819.) The applicant's post office box is Johnston's, and Ms. McCullough does not have access to it. (Tr. 820.) McCullough assisted in the preparation of the EEO portion of the application and the exhibit that accompanied the application reflects the input of both principals. (Tr. 819.)

Sherrie McCullough:

66. McCullough will serve as the station's sales manager/public affairs director. She will work full time on a daily basis -- a minimum of 40 hours per week. She will supervise and set policy for the Sales Department and directly supervise, hire, and fire the staff in that area. As the Public Affairs Director, she will supervise the creation and production of the station's public affairs programming and will be the station's liaison with the local community. (J&M Ex. 3, p. 1.) In the Sales Department, McCullough will have ultimate responsibility for all activities, but Johnston's input will be available. (Tr. 798.) McCullough will make sales calls, and she may request Johnston to also make sales calls. (Tr. 799.) In the event of a disagreement, McCullough will have the final say in the Sales and Public Affairs Departments, while Johnston will have the final say in the other departments. (Tr. 801-802.)

67. McCullough is an American of Japanese descent. In 1950, she moved with her family to within the proposed service area of the station, and has lived in the service area continuously to the present, except for the two years from 1980 to 1982. (J&M Ex. 3, p. 2.)

68. McCullough joined the Monterey County Society for Prevention of Cruelty to Animals (S.P.C.A.) Board in 1982, and stayed active for six years. During this period, she was a volunteer with the Monterey Peninsula Chamber of Commerce. She was chairman for the Chamber's annual membership drive and joined the Board of Directors for six years. During those six years, she held various positions as treasurer, vice-president, and in 1988 was elected president. At the present time, McCullough is not

on the Board, but is still involved, chairing the live auction committee for its first auction, and serving on the nominating committee. (J&M Ex. 3, pp. 4-5.)

69. McCullough is vice-president of the Board of Directors of the Monterey County Symphony Association. She oversees its fund development and marketing committees, serves on its nominating and search committee, and has participated in fund raising activities for the symphony. She is involved in the United Way of the Monterey Peninsula, joined the Board of Directors in 1989, and was the 1990 Campaign Chairman. (J&M Ex. 3.)

70. In 1989, McCullough was on the March of Dimes Gourmet Gala Committee and was chairman of the silent auction committee. She has helped in the American Cancer Society's "Jail and Bail" and the Monterey Institute of International Studies gala. (J&M Ex. 3, p. 6.)

71. Stoddard Johnston and Sherrie McCullough did not initially sign a written partnership agreement. (Tr. 731.) On May 1, 1990, Sherrie McCullough wrote a one-page letter to Stoddard Johnston, which he countersigned, commemorating their oral partnership arrangement. (Cal Tower Ex. 13.) They decided to proceed as an oral general partnership prior to a grant of the application in order to avoid both the cost of incorporating and the cost of preparing a written partnership agreement. (Tr. 731.) As already noted, it has always been their intention to form a corporation if J&M prevails in this hearing. (Tr. 759.)

Diversification

72. Other than the J&M application, neither the applicant nor its principals or their spouses, have any interest, either directly or indirectly, in any medium of mass communications. (J&M Ex. 1.)

Auxiliary Power

73. J&M will install and maintain auxiliary power generation facilities at both its studio and transmitter sites so that the station may remain on-the-air continuously in the event of a commercial power failure at either or both locations. (J&M Ex. 1, p. 1.)

ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

74. Four applicants remain in this proceeding. With the exception of Highlands Broadcasting Co., Inc. (Highlands), there are no basic issues outstanding with respect to the remaining applications. Highlands must meet a real party-in-interest issue relating to Alan Schultz' alleged involvement in the Highlands application. Because only basically qualified applicants are entitled to comparative consideration,¹² the real party-in-interest issue will be resolved before the comparative issue is addressed.

75. An issue was specified to determine whether Schultz is a real party-in-interest in the Highlands application. The Commission considers an individual a real party-in-interest if such person has an ownership interest or will be in a position to control, actually or potentially, the operation of the station. *San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7008, (1987); *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (1983). While it appears that originally Schultz and Wisdom intended that WBCI would be the applicant for the FM station, these plans changed, and only Wisdom decided to pursue the FM proposal under Highlands, a new corpora-

tion he formed for the purpose of prosecuting the FM application. Thus, the Findings reflect Schultz' early involvement in the effort to have the Commission allocate the FM channel to Carmel. But, after the decision was made that Wisdom alone would pursue the FM application as Highlands, Schultz' role in the prosecution of the application was only that of a lender. Thus, Schultz had no role in the preparation of the application; he did not retain the engineer; he did not prepare the cost estimates or arrange for financing. Moreover, Schultz' time commitment to his employer, Douglas Broadcasting, and his management duties precluded his involvement in the FM proposal. There is no evidence that Schultz has an ownership interest in Highlands, a corporation wholly owned by Wisdom. Nor do the findings suggest that Schultz is or will be in a position to control the operation of the station. His role as lender does not place him in a position to control the operation of the FM station.

76. Lone Cypress argues that Schultz should be held a real party-in-interest in the Highlands application and cites several factors to support its position. Thus, Lone Cypress argues that Schultz was the individual who had the idea to have an FM channel assigned to Carmel; that WBCI, owned partially by Schultz, originally intended to file for the channel; that Schultz inquired about a possible Daytime Preference; that although Schultz stated that his interest in applying for the FM channel ended, Lone Cypress challenges this by referring to the FM convertible Note (which would have given Schultz a 50 percent non-voting interest in Highlands) and the money Schultz loaned Wisdom to prosecute the application. Finally, Lone Cypress argues that it is implausible for Schultz not to want to own an FM station in Carmel instead of an AM station.

77. There is no question but that Schultz early on was interested in pursuing an FM station in Carmel, as noted by Lone Cypress.¹³ This was evidenced by the fact that Schultz originated the idea of seeking the allocation of an FM channel for Carmel; that it was intended that WBCI would be the applicant; and that Schultz inquired regarding the Daytime Preference. But, once Schultz decided not to pursue the FM station, he did nothing to indicate he was a real party-in-interest. His participation was that of a lender. And, while his loans were secured by a convertible Note which could have resulted in Schultz becoming a holder of non-voting Highlands stock, this Note was cancelled.¹⁴ Thereafter, Schultz had no right to acquire an interest in Highlands. Thus, Loan Cypress' reliance on the FM convertible Note to establish that Schultz is a real party-in-interest is misplaced. Once the Note was cancelled, Schultz' only involvement with Highlands was to make small loans to Wisdom. Such activity does not make Schultz a real party-in-interest in Highlands' FM application.

78. Finally, Loan Cypress' argument, that it is implausible for Schultz not to want an FM station in Carmel, instead of the AM station which he and Wisdom own, is not persuasive because this argument ignores the fact that Schultz has been trying to sell the AM station. Thus, Schultz does not want to own any radio station in Carmel, not an AM or an FM. Schultz has adequately explained why he decided not to pursue the FM channel. Both Schultz and Wisdom testified at length regarding this issue and appeared to be forthcoming in providing information relevant to their dealings, not only involving the FM station application, but also the AM station and WBCI. In

view of the foregoing,¹⁵ it is concluded that Schultz is not a real party-in-interest in the Highlands application, that Highlands is not disqualified, and that Highlands is entitled to comparative consideration in this proceeding.

79. In its 1965 *Policy Statement on Comparative Broadcast Hearings (Policy Statement)*, 1 FCC 2d 393, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.¹⁶

80. Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership (Paso Hondo) and Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company (J&M) have no attributable media interests under the diversification criteria. Neither does Highlands, although arguments are made that Wisdom will be unable to dispose of his interest in the Carmel AM station. In this connection, Wisdom proposed to divest himself of the Carmel AM station. However, because there were tax liens outstanding against the AM station, it is argued that such liens would be an impediment to Wisdom's ability to sell the station. The short answer to this is that the liens have since been satisfied. They no longer constitute a possible impediment to Wisdom's sale of the station. But even if they still existed, there is no showing that these liens would be treated any differently than a mortgage so as to preclude a sale of the AM station. The liens would have been satisfied out of the proceeds of the sale. It has not been shown that Wisdom will be impeded in his ability to dispose of the AM station. Thus, no diversification demerit against Highlands is warranted.

81. Lone Cypress has no other media interests. But, L. E. Johnson, its 33 1/3 percent owner has a significant ownership and management position in another FM station. Specifically, Mr. Johnson is a general partner and owner of a 35 percent attributable interest in the license of FM station KPOA(FM), Lahaina, Hawaii. None of the remaining general partners (or shareholders in the corporate general partnership) own a larger interest in KPOA(FM). Mr. Johnson's ownership interest in KPOA is active. He is regularly consulted concerning the station, and he takes an active role in its affairs. However, because the Hawaii station is located 2,000 miles from Carmel, and because Johnson does not have a majority ownership interest in either the Hawaii station or Lone Cypress, only a slight diversification demerit is warranted. *Julia S. Zozaya*, 5 FCC Rcd 6607 (1990); *Joseph Bahr*, 92 FCC 2d 114 (1982).

82. Under the best practicable service to the public criteria, the Commission considers the extent to which the owners of the proposed station will be integrated into the management of the station and the qualitative attributes of the participating owners. Such qualitative factors include minority ownership and participation, local residence, civic involvement, and, of lesser importance, past broadcast experience.

83. Lone Cypress, Highlands, and J&M each claim 100 percent integration credit. Paso Hondo seeks no integration credit in this proceeding and is entitled to none. However, there are various arguments advanced that the applicants seeking 100 percent integration credit are not entitled to such credit.

84. Lone Cypress seeks 100 percent integration credit on the basis of the proposal to integrate full time its three equal owners, Johnson, Oates, and Alvarado, into the management of the station. Johnson will be the General Manager; Oates will be the Station Manager; and Alvarado will be the Sales Manager. However, J&M would only credit the integration proposal of Oates. Highlands, on the other hand, would only credit the integration proposal of Johnson. Neither would credit the proposal of Alvarado.

85. The integration proposal of Lone Cypress is challenged because it is argued that the principals seeking integration credit will not be involved in management activities. Specifically, it is argued that Johnson will perform employee-type functions such as on-air broadcasting and sales; Oates will devote too much of her time to sales and doing commercials; Alvarado will devote a majority of her time to selling and was inconsistent in her testimony regarding the functions she will perform.

86. Johnson will be the General Manager of the proposed station and will perform the duties associated with such a position. The claim that he will perform employee-type functions and not managerial duties is rejected. Johnson is entitled to 100 percent integration credit on the basis of his proposal to devote full-time, 40 hours per week, to his duties as general manager of the station.¹⁷

87. While Oates will devote time to selling and doing commercials, this does not mean that she will not perform managerial functions at the station. She will be the full-time Station Manager, a managerial position, and as such will participate in the decision-making process at the station. In a small FM station, such as is proposed, it is not uncommon or unusual for the participating owners to devote time to selling. Indeed, it would seem the success of any start-up station depends on the ability to generate sales and attract an audience. Thus, participating owners who say they will devote time to selling are being realistic. That Oates will sell time for the station does not detract from her integration credit. *Victorson Group, Inc.*, 6 FCC Rcd 1697 (1991); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6128 (1987), *rev. denied*, 3 FCC Rcd 4541 (1988); *Debra D. Carrigan*, 100 FCC 2d 721, 738 (1985).

88. The same can be said regarding Alvarado. Although she may spend 60 percent of her time as sales manager selling time herself, that does not mean she will not have managerial functions. As a one-third owner of Lone Cypress, Alvarado will manage the sales efforts of the station and, as such, is entitled to integration credit as the proposed Sales Manager. And, simply because she will not actually serve as the Program Director, as claimed in the integration statement (beyond the initial period of station operations), does not detract from her integration credit as sales manager. Finally, it is argued that Alvarado will not terminate her present broadcast employment and, therefore, she would be working 80 hours a week, a proposal not deserving of integration credit. However, Alvarado has pledged to terminate her position with a broadcast station and, thus, she will have no conflicting commitment to impair her ability to integrate full-time as sales manager.

89. Johnson's integration is enhanced by his local residence, limited civic involvement, and past broadcast experience. Although Oates has always resided in Monterey County, there is no showing that her residences were within the one mV/m contour of the station. Thus, while

Oates receives credit for female ownership, management participation, and past broadcast experience, the findings do not support credit for local residence.

90. Alvarado receives female and minority credit as a Hispanic. She also has past broadcast experience. But, as in the case of Oates, the Findings do not establish local residence, only past residence within Monterey County. Whether those residences were within the proposed service area is not apparent.

91. Thus, to summarize, Lone Cypress receives 100 percent integration credit with enhancement credit as follows: one-third local residence; two-thirds female credit; one-third minority credit; and 100 percent past broadcast experience. Lone Cypress also receives credit for proposing auxiliary power.

92. Highlands seeks 100 percent integration credit for its proposal to integrate Wisdom, Highlands' sole owner, full-time, into the management of the station as general manager. However, it is argued that Highlands is not entitled to 100 percent integration credit for the proposed full-time work commitment of Gilbert Wisdom because of the connection between Highlands and Alan P. Schultz (Schultz). In this connection, Schultz loaned Highlands \$1,500 in February 1988 that the Promissory Note evidencing that obligation gave Schultz the right to convert the loan into 50 percent of Highlands' equity in the form of 1,500 shares of non-voting stock. Highlands repaid the \$1,500 loan (with interest) to Schultz in June 1990, and Schultz' conversion option was thereby terminated.

93. Citing *Payne Communications, Inc.*, 1 FCC Rcd 1052 (1986), it is argued that because Schultz' option was in existence as of the "B" cut-off date, his option must be deemed, as a matter of law, to have in fact been exercised (even though in fact it was never exercised). It is further argued, citing *Coast TV*, 5 FCC Rcd 2751 (1990), that even though Schultz' option was to acquire non-voting Highlands stock, his involvement in Highlands and its application has been such that he must be considered as an "active" principal in Highlands for purposes of integration analysis.¹⁸

94. The arguments seeking to impose an attributable interest in Highlands to Schultz lack merit, and they are rejected. Clearly, *Payne, supra*, is not applicable because the option Schultz held was for a non-voting stock interest in Highlands. Moreover, in *Coast TV, supra* (page 2752), the Commission held that "where a 'passive' owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor," the owner will be considered "active" and his/her ownership interest will be considered for purposes of integration analysis.

95. Schultz' involvement in the FM application process preceded the filing of Highlands' application. His only involvement after the filing of the Highlands application was that of a lender.¹⁹ Such involvement as a lender did not make Schultz an active investor sufficient to attribute his option to acquire a 50 percent non-voting stock interest into an active interest for comparative integration analysis. *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television, and Newspaper Entities*, 58 RR 2d 604, 620 (1985). Thus, Highlands is entitled to 100 percent integration credit.

96. Wisdom's integration proposal is enhanced by his residence within the service area since 1986, including residence within the city of license from January 1986 to January 1987. He will move within the city limits of Carmel if the Highlands application is granted. Wisdom receives some credit for civic participation, although such participation has not been particularly extensive. Wisdom also receives credit for past broadcast experience and his proposal for auxiliary power.

97. Wisdom also seeks minority credit for being a Hispanic and an American Indian. However, these claims were challenged by other applicants, and Wisdom has not substantiated his claim for such credit. The factors relied upon by Wisdom are set forth in the Findings, paragraphs 24-25. These factors appear similar to the ones rejected in *Jarad Broadcasting Co., Inc.*, 61 RR 2d 389, 399 (1986). Specifically, an "American Indian" entitled to minority credit is "a person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition." Wisdom has not substantiated his claim for minority credit with any form of documentation such as a birth certificate, tribal records, certification by a government agency, or other written evidence of genealogy. Wisdom's claim for minority enhancement credit is not self-evident. He has not established his entitlement to minority enhancement credit. Thus, no such credit will be awarded. Accordingly, Highlands receives 100 percent integration credit enhanced by short-term local residence (five years), some civic participation, past broadcast experience, and auxiliary power.

98. J&M seeks 100 percent integration credit for its proposal to integrate its two general partners, Johnston and McCullough, into full-time management positions at the station. However, arguments are made that J&M is not entitled to any integration credit because it did not have a written document evidencing its general partnership until May 1990, which was six weeks after integration statements were filed; that the written document is at odds with the integration plan; that the one-page general partnership agreement is inadequate; that because J&M will form a corporation to operate the station, its partnership application cannot be granted; that because McCullough's husband has been involved in making decisions and financing, the integration credit for McCullough should be diminished.

99. The absence of a written partnership agreement prior to the "B" cut-off date does not mandate denial of integration credit when uncontroverted sworn and written testimony establishes the existence of the partnership. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599 (1991). Nor does a different result obtain simply because the written general partnership agreement between Johnston and McCullough was executed after integration statements were filed. Both Johnston and McCullough agreed at the inception of their pursuit of the FM station that they would be a general partnership, with each partner holding a 50 percent interest. This structure has not changed, and the applicant has conducted itself as a general partnership throughout this proceeding. There is no reasonable basis for denying integration credit merely because the general partnership agreement was signed after the "B" cut-off date.

100. While Lone Cypress argues that the J&M written partnership agreement is inadequate, there is no meritorious reason advanced why the agreement is inadequate.

The agreement was prepared to memorialize the handshake arrangement that governed the general partnership from its inception.

101. It is further argued that because Johnston and McCullough intend to operate the station as a corporation (with each owning 50 percent of the stock), its partnership application is not entitled to integration credit. This argument has no merit. It was previously considered by the Presiding Judge in ruling on a petition to enlarge issues. (*See, Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-3248, released October 22, 1990.) Significantly, the management functions and responsibilities to be performed by Johnston and McCullough upon which their claim for integration credit is based will be the same under the corporate form as under the general partnership form. Under these circumstances, the mere change in structure has no impact on the integration credit to which J&M is entitled.

102. Finally, it is argued that McCullough's integration credit should be diminished because her husband has been involved in the application. First, there is no evidence that McCullough's husband has participated in any meaningful way in preparing, prosecuting, or financing the application. Aside from demonstrating the usual interest one spouse would customarily show in the business interests of the other, there is no record evidence of involvement on the part of Mr. McCullough which would warrant diminishing the integration credit of McCullough. Thus, unlike *Richard P. Bott, II*, 4 FCC Rcd 4924 (1989), Mr. McCullough has not acted in a manner which would infer that he is a principal.²⁰ This project is being solely pursued by Ms. McCullough, not jointly with her husband, and there is no reasonable basis for diminishing her integration credit. *Colonial Communications, Inc.*, 5 FCC Rcd 1967 (1990). Thus, J&M will receive 100 percent integration credit.

103. The 100 percent integration credit of J&M is enhanced by the long time local residence of both Johnston and McCullough. Johnston has been a resident of Carmel and the service area for 26 years; McCullough has resided within the service area for 30 years. Also, both McCullough and Johnston have been significantly involved for a long time in civic activities, and McCullough also receives enhancement credit for being a female and a minority. Finally, J&M receives past broadcast experience for Johnston and for its auxiliary power proposal.

104. To summarize, Highlands, Lone Cypress, and J&M have received 100 percent integration credit. Of the three, the qualitative factors enhancing the integration credit of J&M are greater than the factors favoring the other two applicants. The long time local residence and active long time civic involvement of both Johnston and McCullough is superior to the other applicants. Moreover, 50 percent of the integration credit of J&M receives female and minority enhancement. Lone Cypress has 66 percent female ownership and 33 percent minority ownership, quite similar to J&M's enhancement credit for these factors.²¹ But, Lone Cypress does not have the extent of local residence and significant civic involvement that enhances the J&M application.²² Also of significance, Lone Cypress has a slight diversification demerit resulting from Johnston's ownership interest in another FM station, Highlands, whose integration is enhanced by short term local residence and limited civic participation is behind J&M on qualitative factors.²³ Based on consideration of the enhancement factors, J&M is preferred over both High-

lands and Lone Cypress under the comparative issue, and a grant of its application will best serve the public interest. Paso Hondo, with no integration credit, is not a serious contender. It is out of the running.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Stoddard Johnston and Sherrie McCullough d/b/a J & M Broadcasting Company (File No. BPH-880211MM) for a construction permit for a new FM station on Channel 238A in Carmel, California, IS GRANTED,²⁴ subject to the following condition:

Upon receipt or notification from the Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.

IT IS FURTHER ORDERED that the applications of Lone Cypress Radio Associates, Inc. (File No. BPH-880210ML), Highlands Broadcasting Co., Inc. (File No. BPH-880211MK), and Paso Hondo Broadcasting Limited Partnership, a California Limited Partnership (File No. BPH-880211ML) ARE DENIED.²⁵

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

¹ The application of George S. Flinn, Jr., was dismissed by *Order* of the Presiding Judge, FCC 90M-720, released April 5, 1990; the application of California Kool Broadcasters Limited Partnership was dismissed by *Order* of the Presiding Judge, FCC 90M-721, released April 5, 1990; and the application of Carmel Broadcasting Limited Partnership was dismissed on the record at a hearing on March 4, 1991. This dismissal was confirmed by *Memorandum Opinion and Order* of the Presiding Judge, FCC 91M-871, released March 8, 1991. Cal Tower Broadcast Group requested that its application be dismissed in a filing dated October 22, 1991. By *Order* of the Presiding Judge, released December 3, 1991 (FCC 91M-3372), the application of Cal Tower Broadcast Group was dismissed, with prejudice.

² Also, the following issues were specified against Carmel Broadcasting Limited Partnership (CBLP) by *Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-3695, released November 23, 1990:

To determine whether Frederik R. L. Osborne, President and majority stockholder of Auburn Cablevision, Inc., the purported "limited partner" in CBLP, has abused the Commission's processes in other comparative hearing

proceedings (e.g., Irondequoit, New York - MM Docket No. 80-517 and Fresno, California, MM Docket No. 88-21) and/or in this proceeding; and

To determine, in light of the evidence adduced pursuant to the foregoing issue, whether CBLP is qualified to become a Commission licensee.

As noted earlier, CBLP defaulted in the prosecution of its application under these issues, and its application was dismissed.

³ At her deposition, Alvarado stated that she could spend "a good 95 and a half percent" of her time selling, but more realistically estimated the time as "60 to 70 percent." (Tr. 470.)

⁴ Hawaii state law requires that limited partnerships have individuals named as general partners, which accounts for Johnson's two separate interests, one in the corporate general partner and one as a named individual general partner. (Tr. 404.)

⁵ Wisdom has not been an officer, director, or member of any committee in the Chamber of Commerce or the Ad Club.

⁶ Wisdom's current 20,000 shares plus Schultz' current 4,000 shares, plus Schultz' additional 16,000 shares equals 40,000 shares. This would give Schultz 50 percent ownership of WBCI (i.e., 20,000/40,000 = 50 percent), and Schultz' additional 16,000 shares would represent 40 percent of the total 40,000 shares of outstanding WBCI stock.

⁷ The engineering consultant that Schultz contacted was Dave Williams. Schultz did not know Williams prior to the time WBCI purchased KRML-AM. (Tr. 1594.)

⁸ Wisdom had discussions with Frank Jazzo regarding whether WBCI would qualify for the Daytimer's Preference if it were an applicant for the new Carmel FM facility. (Tr. 1428.) Jazzo also discussed this matter with Schultz and subsequently wrote Schultz a letter on the topic. (Tr. 1685; Lone Cypress Ex. R-2.)

⁹ Jazzo confirmed this when he testified that Schultz did not react with much concern over WCBI's ineligibility for the Daytimer's Preference. (Tr. 1691.)

¹⁰ Since February 1989, through his employment at Douglas Broadcasting, Schultz has been active in the management duties of radio Stations KEST-FM (San Francisco, California) and KWWN-FM (Placerville, California), working a total of about 60-70 hours each week. In addition to KEST and KWWN, Schultz recently assumed management duties at radio Station KOBO-AM (Yuba City, California). (Highlands Ex. R-2, p. 2.)

¹¹ The last loan Schultz made to Highlands was on May 10, 1990. (Lone Cypress Ex. R-3.) At that same time, another benefactor stepped in to finance Highlands. Ms. Judith Garber, identified as Wisdom's friend at the time of depositions and now his wife, started "funding" Highlands on May 1, 1990. She made nine "loans" to Highlands between May 1, 1990, and October 30, 1990. (Tr. 1445; Lone Cypress Ex. R-4.)

¹² *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub. nom.*; *Guinan v. Federal Communications Commission*, 297 F. 2d 782 (1961).

¹³ Schultz testified at his deposition that he, at no time, thought he would be part of the entity that would apply for the FM station. He explained that he thought the question asked related to Highlands and answered accordingly. Schultz had no intention of participating in the Highlands application for the FM station. (Tr. 1592-1593.)

¹⁴ The record does not reflect who was responsible for suggesting a convertible Note to secure Schultz' loans to Highlands. It appears that Wisdom, Schultz, communications counsel, and local counsel all participated to some degree in the origination and preparation of the Note.

¹⁵ Lone Cypress' reliance on the attendance of Schultz at a settlement meeting to show he was a real party-in-interest is unpersuasive. Schultz attended the meeting because one of the proposals for consideration was the disposition of WBCI's AM station as part of the settlement. Because Schultz had an ownership interest in the AM station, it was not unusual for Schultz to have attended the meeting.

¹⁶ The applicants stipulated that there is no significant difference in the areas or populations to be served by their respective proposed stations, and no applicant is entitled to any comparative advantage in this proceeding for superior coverage *vis - a - vis* any other applicant. (*Joint Ex. 1* received by Order of the Presiding Judge, released September 4, 1990 (FCC 90M-2775).)

¹⁷ Johnson has a restaurant which he owns, but he now devotes only 25-30 hours a weeks to this interest, employees to run the restaurant are in place, and, in any event, such interest will not interfere with his ability to fulfill his integration commitment.

¹⁸ See, CBLP's proposed conclusions of law at paragraphs 88-89 and Lone Cypress' proposed conclusions at paragraph 75.

¹⁹ Schultz also participated in a settlement meeting, but he did so as a stockholder of WBCI, not as an active participant in Highlands. Because one of the settlement scenarios to be discussed involved WBCI's AM station (KRML(AM)) of which Schultz was part owner, he was present at the meeting.

²⁰ Mr. McCullough is a stockbroker who has never been an owner, operator, or employee of a broadcast station. He will not be involved in the proposed station.

²¹ Past broadcast experience is a factor of limited significance. Lone Cypress and Highlands have 100 percent past broadcast experience; J&M has 50 percent past broadcast experience.

²² Even if Lone Cypress received 100 percent local residence credit, because the local residence credit of the J&M principals is of greater duration and includes significant and extensive involvement in civic organizations, the J&M application would still be favored on this score.

²³ Each of the applicants receiving 100 percent integration credit has proposed auxiliary power, and no preference on this score is warranted.

²⁴ In a "Submission for the Record" filed by J&M on March 5, 1991, it was reported that the FAA raised questions regarding the potential of substantial adverse effect upon air/aground communications equipment from the J&M proposal. No air hazard issue against J&M was specified in the *Hearing Designation Order*, and none has been requested. However, because of the potential for interference to communications, the grant to J&M will be made subject to the condition usually specified in these situations.

²⁵ 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).