

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. 90-424
)	
WESTERN CITIES BROADCASTING, INC.)	File No. BRH-891201XU
)	
For Renewal of License of)	
Station KQKS(FM) on Channel 282C1)	
at Longmont, Colorado)	
)	
AMADOR S. BUSTOS)	File No. BPH-900228MB
)	
For Construction Permit for a New)	
FM Broadcast Station on Channel 282C1)	
at Longmont, Colorado)	
)	
LONGMONT BROADCASTING CORPORATION)	File No. BPH-900216MA
)	
For a Construction Permit for a New)	
FM Broadcast Station on Channel 282C1)	
at Longmont, Colorado)	
)	
WESTERN CITIES BROADCASTING, INC.)	File No. BLH-890104KC
)	
For a License to Cover Minor)	
Changes to Station KQKS(FM))	
Longmont, Colorado)	

Appearances

Harry C. Martin, Esquire, Andrew S. Kersting, Esquire, Thomas Schattenfield, Esquire, Paul J. Feldman, Esquire, Gerald P. McCartin, Esquire, and Matthew H. McCormick, Esquire, on behalf of Western Cities Broadcasting, Inc.; Dennis J. Kelly, Esquire, on behalf of Amador S. Bustos; Gene A. Bechtel, Esquire, Lewis I. Cohen, Esquire, and John J. Schauble, Esquire, on behalf of Longmont Broadcasting Corporation; Howard A. Topel, Esquire, on behalf of William J. Schueller d/b/a Eldorado Communications; Jerrold D. Miller, Esquire, on behalf of Carl

Schlueter d/b/a Boulder Communications; and *Robert A. Zauner, Esquire*, and *James W. Shook, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG**

Issued: October 24, 1996

Released: October 31, 1996

PRELIMINARY STATEMENT

1. Under consideration are: (i) a Joint Request for Approval of Merger Agreement, filed on September 6, 1996, by Western Cities Broadcasting, Inc. ("Western Cities"), Amador S. Bustos ("Bustos"), Longmont Broadcasting Corporation ("LBC"), and Michael L. Glaser d/b/a St. Vrain Communications Co. ("St. Vrain");¹ (ii) an Amendment to Joint Request for Approval of Merger Agreement, filed on September 16, 1996, by Western Cities, Bustos, LBC, and St. Vrain; (iii) Mass Media Bureau's Comments on Joint Request for Approval of Merger Agreement, filed on September 16, 1996, by the Bureau; (iv) a Joint Request for Approval of Agreement, filed on October 8, 1996, by William J. Schueller, d/b/a Eldorado Communications,² and Western Cities;³ (v) an Amendment to Merger Agreement, filed on October 9, 1996, by Western Cities; and (vi) Mass Media Bureau's Comments on Joint Request for Approval of Agreement, filed on October 22, 1996, by the Bureau.

2. The *HDO* in this proceeding designated for hearing Western Cities' renewal application, along with the competing applications of Bustos and LBC. As pertinent here, the following issues were specified:

¹ St. Vrain's application for the Longmont facilities was dismissed by the Mass Media Bureau ("Bureau") in the *Hearing Designation Order*, 5 FCC Rcd 6177 (1990) ("*HDO*"), but was reinstated by the U.S. Court of Appeals for the D.C. Circuit in *Michael L. Glaser d/b/a St. Vrain Communications Co. v. FCC*, 20 F.3d 1184 (D.C. Cir. 1994). Because St. Vrain's reinstated application is before the Bureau rather than the Presiding Judge, a separate Joint Request for Approval of Merger Agreement was filed with the Bureau.

² Eldorado Communications will be referred to herein as "Eldorado" and William J. Schueller will be referred to as "Mr. Eldorado." (*See* Tr. 2958-59.)

³ As noted above, the St. Vrain application is presently pending before the Bureau. Therefore, a separate Joint Request for Approval of Agreement was filed with the Bureau.

- (c) To determine whether Western [Cities] committed a misrepresentation or was lacking in candor in its response to Section I, Item 3, of its application (FCC Form 302) for a license to cover minor changes to KQKS(FM) and the effect(s) thereof on Western [Cities'] qualifications to be a Commission licensee.⁴
- (d) If a final decision is rendered in the Montecito, California, proceeding (MM Docket No. 87-426), in which it is determined that Richard C. (Rick) Phalen was an undisclosed real party-in-interest in the application of his daughter, Shawn Phalen, to determine the effect(s) thereof on Western [Cities'] qualifications to be a Commission licensee.

3. The *HDO* made Eldorado and Carl Schlueter d/b/a Boulder Communications parties to this proceeding.⁵ (*HDO* at para. 21.) The *HDO* assigned to Eldorado and Boulder the burden of proceeding with the introduction of evidence as to Issue (c). The *HDO* assigned to Bustos and LBC the burden of proceeding with the introduction of evidence as to Issue (d). The burden of proof on Issues (c) and (d) was placed on Western Cities. (*Id.* at para. 25.)

4. Before a final decision was reached in the Montecito proceeding, the Commission issued a *Memorandum Opinion and Order*, 7 FCC Rcd 7638 (1992), approving a settlement agreement between the applicants in that case. In the *Memorandum Opinion and Order*, the Commission vacated the findings and conclusions in *Shawn Phalen*, 7 FCC Rcd 623 (Rev. Bd. 1992), *Shawn Phalen*, 4 FCC Rcd 5714 (I.D. 1989), and *Shawn Phalen*, 6 FCC Rcd 2789 (S.I.D. 1991). The Commission also instructed the Presiding Judge to modify appropriately the wording of designated Issue (d). By *Order*, FCC 92M-1094, released December 21, 1992, Issue (d) was modified to read as follows:

- (d) To determine whether Richard C. Phalen was an undisclosed real-party-in-interest in the application of his daughter, Shawn Phalen, for a construction permit for a new FM station at Montecito,

⁴ Issue (c) was modified to specify Section I, Item 3. (Tr. 818-19; *Order*, FCC 92M-36, released January 9, 1992.)

⁵ Boulder Communications will be referred to herein as "Boulder" and Carl Schlueter will be referred to as "Mr. Boulder." (See Tr. 2958-59.)

California (File No. BPH-851231MO), and, if so, the effect thereof on the qualifications of Western [Cities] Broadcasting, Inc., to remain a Commission licensee.

5. Prehearing conferences in this proceeding were held on January 15, May 2, and July 31, 1991, and on December 17, 1992. Hearings were held in Washington, D.C., on September 25, 26 and 30, 1991, October 1, 1991, January 7-10, 13, 15-17, 21 and 23, 1992, March 23, 30 and 31, 1993, and April 1 and 6, 1993. The record was initially closed on January 23, 1992 (Tr. 2961; *Order*, FCC 92M-118, released January 28, 1992), but was reopened on several occasions. The record was closed for the final time on April 28, 1993. (*Memorandum Opinion and Order*, FCC 93M-206, released April 28, 1993.) Proposed findings of fact and conclusions of law were filed on June 19, 1992, and May 28, 1993. Reply findings were filed on July 2, 1992, and June 25, 1993.

6. In light of the opinion of the United States Court of Appeals for the District of Columbia in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the Commission, since February 25, 1994, has held in abeyance the adjudication of hearing proceedings involving mutually exclusive proposals for broadcast facilities. In *Bechtel*, the court held that the integration of ownership into management, one of the principal criteria used in evaluating applicants for broadcast facilities, was arbitrary and capricious and therefore unlawful. Because integration has been a crucial factor in these types of cases, the Commission decided to stay such pending cases while it considered appropriate action responsive to the court's opinion. The Commission instructed Administrative Law Judges to issue decisions *only* in cases in which consideration of the applicants' comparative qualifications was unnecessary to resolve the case. *Public Notice*, "FCC Freezes Comparative Proceedings," 9 FCC Rcd 1055 (1994). Since any possible determination in this proceeding necessarily involved the applicants' comparative positions, this case was subject to the freeze.

7. In *Public Notice*, "Modification of FCC Comparative Proceedings Freeze Policy," 9 FCC Rcd 6689, 6690 (1994), the Commission stated that:

[P]roceedings will not be bifurcated to adjudicate the basic qualifications of some of the applicants, where their disqualification would leave unresolved comparative issues involving other applicants, even if those other applicants contemplate entering into a settlement. If, however, the parties actually file a request for

approval of a settlement, which is contingent upon resolution of specified basic qualifying issues, such issues will be adjudicated.

See also Settlements in Comparative Broadcast Proceedings, 11 FCC Rcd 4748 (1996).

8. The proposed settlement in this proceeding contemplates the dismissal of the competing applications of Bustos, LBC, and St. Vrain, and the grant of the renewal application of Western Cities. Consequently, resolution of this case no longer involves the analysis of comparative factors. Therefore, Issues (c) and (d), which relate to the basic qualifications of Western Cities to remain a Commission licensee, are now ripe for consideration.

FINDINGS OF FACT

Issue (c) -- Misrepresentation/Lack of Candor Issue

9. Pre-Eldorado Mountain. In 1986, Richard C. Phalen retained David Tillotson, Esquire, to represent him in connection with his efforts to acquire what is now Station KQKS(FM), Longmont, Colorado. Tillotson has served as communications counsel to Richard Phalen, and subsequently to the company which Richard Phalen formed to acquire and operate KQKS, Western Cities, in connection with all phases of the acquisition of KQKS and Western Cities' ownership and operation of the station. (Western Ex. W22, p. 1.)

10. As communications counsel, Tillotson represented Western Cities in its application to relocate KQKS' facilities from the site at which they were located at the time Western Cities purchased the station to a site on Lee Hill in Boulder County, Colorado. Western Cities began operating KQKS from Lee Hill following its acquisition of the station in December 1986. Shortly after KQKS began operating from Lee Hill with program test authority, it was discovered that the operation of KQKS from Lee Hill produced an intermodulation product through the interaction of KQKS' signal with that of another FM station and a paging system located on Lee Hill. The resulting intermodulation product caused interference to the public safety radio facilities operated from Lee Hill by the Boulder County Sheriff's department, which complained to the FCC. The Boulder County Sheriff's department was represented by Michael L. Glaser, Esquire, of the Denver office of Gardner, Carton & Douglas. Consequently, in early January 1987, the FCC revoked KQKS' program test authority at Lee Hill pending resolution of the intermodulation problem. (Western Ex. W22, pp. 1-2; Tr. 1102, 2319.)

11. Based on an engineering analysis of the intermodulation problem encountered at Lee Hill, Western Cities' consulting engineer, Benjamin F. Dawson, III, of the firm of Hatfield & Dawson, concluded that the only certain means of resolving the problem would be for either KQKS, or the paging facility with which its signal was interacting, to relocate to a different site. Western Cities needed to resolve the problem quickly so that KQKS could go back on the air. Accordingly, Western Cities entered into negotiations with Mr. Eldorado to lease space for KQKS at a transmitter site that Mr. Eldorado owned on Eldorado Mountain in Jefferson County, Colorado (the "Site"). Upon reaching a preliminary understanding with Mr. Eldorado providing for KQKS to lease space for its facilities at the Site, Western Cities filed a request for special temporary authority ("STA") for KQKS to operate from the Site pending the filing and grant of an application for a construction permit for that location. The STA was granted on January 16, 1987, and KQKS began operating from the Site on or about January 26, 1987. The Commission telegram granting the STA stated, in pertinent part: "Operation must cease should harmful interference occur. This authority is not a permanent authority." (Western Ex. W22, p. 2; B/E Ex. 5, p. 146; Tr. 1102, 1156, 1332.)

12. KQKS Installation. The installation of KQKS' facilities at the Site was supervised by Harvey Rees, a consultant who had been retained by Western Cities. Rees was assisted by Karl Schipper, who was the Chief Engineer for KQKS. At the time KQKS commenced operations from the Site, Rees advised Mr. Eldorado to report any unusual effects existing Site users may experience that might be related to KQKS' operations. At that time, the KQKS antenna was located at the 40-foot level on the tower and operated with an effective radiated power of 5.0 kilowatts. (Western Ex. W19, pp. 1-2.)

13. The Lease and the MSA. The lease agreement between Eldorado and Western Cities provided that Western Cities was to purchase and install, at its own expense, a multiple systems antenna ("MSA") capable of incorporating Western Cities and Mr. Eldorado's existing tenant, KBCO-FM, as well as two additional FM broadcast stations. Western Cities also was required to pay a deposit of \$50,000 upon execution of the agreement to ensure installation of the MSA. The lease provided that the deposit would be forfeited to Eldorado if Western Cities did not comply with all the terms of the lease, including those contained in the attached addendum. (B/E Ex. 5, pp. 116, 118.)

14. In addition to the terms noted above, the lease agreement contained the following provision regarding interference:

Lessee will use good engineering practices to minimize interference at this [S]ite. Should the operation of Lessee's equipment cause interference to others, Lessee shall, as soon as reasonably possible, remedy same or remove interfering equipment from operation until a remedy can be accomplished.

(B/E Ex. 5, p. 119.)

15. Tillotson was not involved in the initial negotiations with Mr. Eldorado regarding the lease agreement. After KQKS entered into a basic lease agreement with Mr. Eldorado, Tillotson represented Western Cities in negotiating an amendment to the initial addendum which Mr. Eldorado had demanded for the purpose of "protecting" KBCO. The addendum proposed by Mr. Eldorado would have given KBCO veto power over any plans that Western Cities might advance for the MSA. Tillotson advised Western Cities to reject the addendum proposed by Mr. Eldorado, and insist upon it being modified to provide that any dispute between KBCO and Western Cities regarding Western Cities' proposal for the MSA would be resolved by referring the dispute to a consulting engineer whose decision would be binding upon both parties. Tillotson also advised Western Cities that the addendum provide other specific safeguards against disruption of KBCO's operation during the construction of the MSA. A modified addendum incorporating these provisions was later accepted by both Mr. Eldorado and KBCO. (Western Ex. W22, pp. 2-3; B/E Ex. 5, pp. 122-23.)

16. Over the next few months, Tillotson worked with Dawson to prepare an application for a construction permit for KQKS to operate on a permanent basis from the Site. The construction permit application proposed an MSA which not only would radiate KBCO's and KQKS' signals, but would be capable of accommodating the signals of at least two additional stations. This application (BPH-870430IB) (the "MSA Application") was completed and filed with the Commission on April 30, 1987. (Western Ex. W22, p. 3; Western Ex. W21, p.3; B/E Ex. 5, pp. 1-38.)

17. Metro Mobile. The first interference complaint arose in April 1987 when Metro Mobile Communications, Inc. ("Metro Mobile") installed an SMR repeater system at the Site. The system apparently failed to operate when it was initially turned on. Upon visiting the Site to meet with representatives of Metro Mobile, Schipper found that the system had been inadequately grounded. As a result of this meeting, the Metro Mobile system was grounded to help alleviate the effects of the close proximity of the KQKS antenna, and the system became operational. (Western Ex. W19, p. 2.)

18. Metro Mobile's application to operate from the Site was granted on March 17, 1987. Western Cities worked with Metro Mobile to resolve its problems based on its desire to be a "good neighbor" even though Western Cities believed it was not obligated to do so under the FCC's "newcomer" policy because Metro Mobile commenced operation at the Site after KQKS. (Western Ex. W19, p. 2.)

19. In June 1987, Mr. Eldorado informed Schipper that the Metro Mobile system was experiencing increased problems and demanded that KQKS resolve them. Schipper went to the Site on two occasions to meet with representatives of Motorola, which maintained Metro Mobile's facilities, to identify the problem. Schipper and Motorola's representatives agreed that Metro Mobile's equipment was probably being subjected to RF beyond its tolerance and that the building's ground system and earth ground were problematic. Schipper met with Mr. Eldorado and suggested that moving the KQKS antenna to a point higher on the tower would help alleviate the RF field in the building. Mr. Eldorado rejected the idea, claiming that various levels of the tower were dedicated to transmit and receive antennas on various frequencies. (Western Ex. W19, p. 3.)

20. The First Objection. On June 15, 1987, Glaser, on behalf of KBCO, filed an informal objection (the "First Objection") to the MSA Application. This objection was predicated on concerns that because the MSA Application did not contain any information regarding the directional antenna pattern KBCO would have when operating through the MSA, granting a construction permit for the MSA might result in some degradation in KBCO's operations. The objection was supported, in part, by a declaration under penalty of perjury from Mr. Eldorado. (Western Ex. W22, pp. 3-4.)

21. Upon learning of the objection and Mr. Eldorado's supporting declaration, Tillotson called Mr. Eldorado, who was not then represented by counsel, to find out why, if he wanted KQKS to construct an MSA, he had supported an objection to the MSA Application which was a prerequisite to KQKS undertaking any work on the MSA. The telephone conversation between Tillotson and Mr. Eldorado took place shortly after the objection was filed. Mr. Eldorado insisted he was interested in having KQKS proceed with the MSA as quickly as possible. However, he told Tillotson that if KQKS did not proceed quickly, there were other stations waiting to take over the project. Tillotson explained to Mr. Eldorado that KQKS could not begin any work on the project until the FCC granted its MSA Application, and that the objection would delay any action on that application for months. Tillotson also pointed out to Mr. Eldorado that the lease addendum he had insisted upon, and that KBCO had approved, provided KBCO with

complete protection from any disruption of service during the construction of the MSA. The addendum also ensured that no work could even begin on the MSA until a comprehensive plan for the design and installation of the MSA, including a directional antenna pattern equivalent to KBCO's existing pattern, had been approved by KBCO or by an impartial engineering consultant. Tillotson urged Mr. Eldorado to use his position as landlord and site manager to persuade KBCO to withdraw the objection so that the MSA Application could go forward. Mr. Eldorado refused to do so. (Western Ex. W22, p. 4.)

22. Initial Complaints of Interference. During this telephone conversation between Tillotson and Mr. Eldorado regarding the First Objection, Mr. Eldorado mentioned that the existing operation of KQKS at the Site was causing what he referred to as "interference" to two-way equipment operated from the Site by Metro Mobile. Mr. Eldorado stated it was important to move quickly to construct the MSA because moving KQKS' operation would eliminate these problems. Tillotson told Mr. Eldorado that KQKS would do whatever was necessary to eliminate any problems at the Site resulting from its operations, and asked Mr. Eldorado for details as to the nature of the problems. Mr. Eldorado stated that the problems were due to the proximity of KQKS' antenna to the building in which the two-way equipment was located, and mentioned that KQKS had agreed to put copper sheeting on the roof of the transmitter building in order to eliminate the problems Metro Mobile was experiencing. (Western Ex. W22, p. 5.)

23. Mr. Eldorado also mentioned the names of several other individuals and companies who operated two-way equipment from the Site which had experienced problems. It was Tillotson's understanding that these other individuals and companies were customers of Metro Mobile. However, because at the time Tillotson did not ask Mr. Eldorado for specific information regarding the various companies and individuals he mentioned as having experienced problems using their two-way facilities at the Site, Tillotson was uncertain whether everyone Mr. Eldorado referred to as having experienced problems was a Metro Mobile customer. According to Tillotson, Mr. Eldorado did not describe the nature of the problems that Metro Mobile and the other companies and individuals he had mentioned were experiencing, nor did he seem particularly concerned about them. (Western Ex. W22, p. 5.)

24. Tillotson wrote down the names of all the parties Mr. Eldorado referred to as having experienced problems. As soon as his telephone conversation with Mr. Eldorado concluded, Tillotson called Schipper to relate to him what Mr. Eldorado had said regarding the interference problems, and gave Schipper the list of names of companies and individuals Mr. Eldorado mentioned as having experienced problems. Tillotson also discussed with Schipper what Western

Cities had done and would be willing to do to resolve the problems. (Western Ex. W22, pp. 4-6.)

25. Schipper confirmed that during a telephone conversation with Tillotson sometime in July 1987, Tillotson gave him a list, which had been provided by Mr. Eldorado, of two-way radio users at the Site who allegedly had complained of interference from KQKS. (Western Ex. W19, p. 3.) During this conversation, Schipper informed Tillotson of the problem involving Metro Mobile's facilities and customers as the problem had been described to him by Mr. Eldorado. Schipper also informed Tillotson of KQKS' agreement to install copper screening on the building that housed Metro Mobile's two-way equipment, at Western Cities' expense, in the hope that this would eliminate the problems that Metro Mobile was experiencing due to the close proximity of KQKS' antenna to the building in which Metro Mobile's two-way equipment had been installed. (*Id.*; Western Ex. 22, p. 6.) Schipper also told Tillotson that Mr. Eldorado had rejected his proposal to raise the KQKS antenna on the tower. (Western Ex. W19, pp. 3-4; Western Ex. W22, pp. 6-7.)

26. Tillotson advised Schipper that because Metro Mobile had been authorized to operate from the Site after KQKS had commenced operations at the Site, and Metro Mobile did not actually start operating from the Site until a couple of months after KQKS had commenced its operations, Western Cities was not responsible for resolving the problems that Metro Mobile was experiencing. However, Tillotson advised Schipper that Western Cities was obligated to cooperate in good faith with Metro Mobile in an effort to resolve the problems. (Western Ex. W22, p. 6.) In late August and early September 1987, Western Cities installed, at its own expense, copper screening on the roof and walls of the building to reduce the interior RF levels. (Western Ex. W19, p. 3.)

27. Conversations with Mr. Eldorado. Over the next several weeks, Tillotson had at least four additional telephone conversations with Mr. Eldorado regarding the informal objection and the MSA. During these conversations, Mr. Eldorado indicated there were "problems" at the Site, but he did not indicate they were serious. His main concern was that Western Cities was not going to comply with the lease agreement and complete the MSA by sometime in August 1987. Tillotson was concerned that Mr. Eldorado was unwilling and/or unable to do anything to get KBCO to withdraw its informal objection which was impeding the grant of the MSA Application. In an effort to resolve this problem, Tillotson encouraged Mr. Eldorado to hire an attorney who could negotiate with Western Cities and KBCO to resolve the apparent impasse concerning the

progress of the MSA. Tillotson also offered to have Western Cities pay the expenses for such an attorney. Mr. Eldorado rejected Tillotson's proposal. (Western Ex. W22, p. 7.)

28. Tillotson's last direct conversation with Mr. Eldorado occurred in late September 1987. At that time, Tillotson told Mr. Eldorado he could not legally keep the \$50,000 deposit that Western Cities had made under the lease agreement because Mr. Eldorado was partially to blame for Western Cities' inability to proceed with the MSA project. Mr. Eldorado told Tillotson he intended to keep the money and find someone else to construct the MSA. At no point in this conversation did Mr. Eldorado complain that KQKS was causing interference at the Site. Instead, his complaints focused on the delay in getting the MSA project underway. (Western Ex. W22, p. 7.)

29. Early Efforts to Resolve Complaints. At or about the same time Schipper spoke with Tillotson in July 1987, Schipper phoned Mr. Eldorado and obtained a definitive list of the complainants. Schipper requested this list because Mr. Eldorado's previous reports of complaints by users of the Site were in general terms such that the identities of the complainants were unknown. Schipper prepared a detailed memo listing the complainants identified by Mr. Eldorado and, with one exception, contacted each of them in an effort to ascertain the nature of their problems. The list included the following individuals and companies: Metro Mobile (Motorola); E. F. Johnson; KUSA-TV; Triple A Lock; Reed Ambulance; Owens Brothers Concrete; Repeater Services; C3 Communications; Boulder Communications; Clearcom Communications; May D & F; Denver Fund Channel; Federal Express; American Data Path; Astral Communications; Telecom Associates; Microvision; and Tri-state Generation and Transmission. (Western Ex. W19, p. 4 and Ex. 1 thereto; MMB Ex. 1.) Schipper did not contact East Slope Radio at this time because he had learned it was managed by Jerry Clark, a partner of Mr. Eldorado. (Western Ex. W19, Ex. 1, p. 4.)

30. Schipper stated that the first time he received any indication there was a possibility KQKS was interfering with the two-way systems of Boulder was in July 1987 when Mr. Eldorado identified Boulder as one of the complainants. On approximately July 29, 1987, Schipper contacted the owner of Boulder, Mr. Boulder, to learn the nature of problem. Mr. Boulder told Schipper that KQKS' audio could be heard at a barely audible level on one of Boulder's seven frequencies when the level control for the receiver was turned all the way up, but he did not consider this to be a "problem." Mr. Boulder did not indicate he was experiencing any other interference problems. (Western Ex. W19, p. 4.)

31. On August 10, 1987, as Schipper was leaving the Site, he met Mr. Boulder. Mr. Boulder told Schipper he had come to the Site to check a weak signal problem he was experiencing. Schipper told Mr. Boulder he would call him that evening to find out the source of the problem. When Schipper called, Mr. Boulder told him he had been unable to pinpoint the problem. Mr. Boulder gave no indication the problem he was experiencing might be due to KQKS, nor did he describe the problem as one of interference. (Western Ex. W19, pp. 4-5.)

32. On August 28, 1987, Schipper received a telephone call from Mike Johnson of Concord Express, which at that time was a Boulder customer. Johnson called Schipper to complain that his company was having problems with its transmissions and that Boulder had told him KQKS was the source of the problem. Schipper immediately telephoned Boulder and spoke with Robert Foley, an employee. Foley told Schipper that Concord Express was using Boulder's "worst repeater" and that Boulder was hoping the repeater would hold up until Boulder had the funds to replace it. Foley stated that KQKS was not the problem, and explained that Boulder had told Concord Express that KQKS was the problem in order to appease them. Foley also stated it was handy to have KQKS at the Site on which to blame problems. (Western Ex. W19, p. 5.)

33. In his conversation with Foley, Schipper asked for the Concord Express frequency and called Mike Johnson back to inquire further about the nature of the problem Concord Express was experiencing. Johnson told Schipper that when they keyed the repeater they could hear two-way dispatches in addition to their own. Johnson also told Schipper that Concord Express never heard KQKS programming over the repeater. Following his conversation with Johnson, Schipper monitored the Concord Express frequency from time to time. The only disturbance Schipper heard was other two-way dispatches mixing with Concord Express' own dispatches. (Western Ex. W19, p. 5.)

34. Schipper also spoke with Jerry Clark of East Slope Radio during the summer of 1987. Clark complained about music in his audio and "desense." Schipper attempted to set up a meeting with Clark at the Site to check the problem, but Clark told Schipper he did not go to the Site because Mr. Eldorado did his maintenance for him. When Schipper requested Mr. Eldorado to check the problem with him, Mr. Eldorado told Schipper he did not believe there was anything that could be done with the equipment, and nothing was ever done. (Western Ex. W19, p. 6.)

35. During the same time period, Bill Walter, a representative of Reed Ambulance, which leased a frequency from East Slope Radio, told Schipper that Reed Ambulance had music in its audio. Schipper confirmed that there was indeed a little music in the background. Walter also

told Schipper that Reed Ambulance had an ongoing problem getting its repeater to operate properly, and that they had to make repeated calls to Clark and Mr. Eldorado to get any maintenance done. Walter stated that their repeater problems had been going on long before KQKS moved to the Site. In July 1988, Walter informed Schipper that Reed Ambulance had left East Slope Radio for reasons unrelated to interference. (Western Ex. W19, p. 6.)

36. During the first week of September 1987, representatives of Federal Express, which commenced operation at the Site after KQKS (Tr. 1679), and Motorola, which maintained the Metro Mobile facility, called Schipper and told him their problems were getting worse. Federal Express later called Schipper back and informed him that they had been able to trap KQKS out on their telephone cable, thereby eliminating the problem. When Schipper went to the Site with Motorola representatives, he again discovered that one of the biggest problems was poor grounding. Boulder had recently installed a new radio system, but had grounded it with an inadequate wire. Schipper's inspection also revealed that Federal Express' grounding seemed to be inadequate. At that time, ground straps were installed to all coaxes as they entered the communications building. (Western Ex. W19, pp. 6-7.)

37. On October 29, 1987, Mr. Boulder told Schipper he was having a problem with desense in his repeaters. According to Mr. Boulder, the problem was most prevalent during the day, but improved dramatically at night. Mr. Boulder asked Schipper whether KQKS changed any aspect of its operations at night. Schipper explained that because KQKS was an FM station, its operating characteristics were the same during the day and night. Schipper offered to help Mr. Boulder investigate whether there was any relationship between the problem he had described and KQKS' operation. Schipper followed up on this conversation in early November 1987 by calling Mr. Boulder and setting up an appointment to meet with him at the Site the following day. Mr. Boulder telephoned Schipper the next day and informed him he would be unable to keep the appointment. (Western Ex. W19, p. 7.)

38. On November 9, 1987, Schipper telephoned Mr. Boulder again and informed him that KQKS intended to move its antenna 20 feet higher on the tower upon Mr. Eldorado's approval and authorization from the FCC. Schipper asked Mr. Boulder whether he wanted to go to the Site with him to study the problem, or wait until after the antenna had been raised to see whether this eliminated the problem. Mr. Boulder told Schipper he would wait to see what effect the antenna relocation would have. Schipper told Mr. Boulder that if he continued to experience a problem after the antenna was raised, he should telephone Schipper and Schipper would arrange

to meet with him at the Site to see whether they could determine the source of the problem. (Western Ex. W19, pp. 7-8.)

39. In late 1987, Schipper observed that all of the then-existing Boulder equipment had been relocated from one room in the communications building adjacent to the tower, to another. Following this relocation, Schipper inquired about the move and Mr. Boulder told him he was installing a paging system and planned to expand the number of repeaters. Mr. Boulder stated that he wanted to have all of his equipment in one location. Mr. Boulder did not say anything to Schipper about moving the equipment because of interference. (Western Ex. W19, p. 8.)

40. Tillotson testified that sometime in the late summer or early fall of 1987, either Schipper or Dawson explained to him that the problems affecting Metro Mobile's operations from the Site, about which Mr. Eldorado had complained, would most likely be eliminated when the MSA was completed, because the MSA would be located much higher on the tower than the location that Mr. Eldorado had designated for KQKS' single antenna. As an interim measure, however, Western Cities again proposed to Mr. Eldorado that it be permitted to raise KQKS' antenna. This time, Mr. Eldorado agreed to permit Western Cities to raise KQKS' antenna approximately 20 feet. Accordingly, on November 17, 1987, Western Cities filed a request for permission to do so with the Commission, and based its request upon the need to alleviate receiver overload effects from KQKS being experienced by Metro Mobile, whose system had been installed at the Site after KQKS' arrival. The antenna was raised with FCC approval on or about December 1, 1987. (Western Ex. W22, pp. 7-8.) After this move, Mr. Eldorado stated that with the exception of Metro Mobile, the interference problems had been resolved. Mr. Eldorado also stated that Metro Mobile's problem was sufficiently reduced to a level with which they could live. (Western Ex. W19, p. 8.)

41. Throughout the winter and early spring of 1988, Schipper heard nothing further from Mr. Eldorado, Mr. Boulder, or anyone else concerning an interference problem at the Site. When Schipper had conversations with Mr. Eldorado during this period concerning the MSA project and other topics, Mr. Eldorado never said anything which indicated that Boulder was continuing to experience a problem. Consequently, Schipper assumed the problem Mr. Boulder had complained of in November 1987 had ceased when KQKS raised its antenna. (Western Ex. W19, p. 8.)

42. Schipper's Scanner (I). In August 1987, Schipper installed a Regency D-300 programmable scanner in his office so he could personally monitor the frequencies which Mr.

Eldorado, and later Mr. Boulder, claimed were receiving interference. (Western Ex. W19, p. 16.) Dawson stated that the use of a Regency programmable scanner was a reliable and dependable method of monitoring the noise level on a two-way communications channel. (Western Ex. W21, p. 6.)

43. Between August 1987 and August 1988, Schipper monitored two or three times per week the various frequencies about which Mr. Eldorado and Mr. Boulder had complained. From August 1988 through January 4, 1989, Schipper monitored these frequencies almost daily. (Western Ex. W19, p. 16.)

44. While monitoring these frequencies, Schipper heard KQKS audio only occasionally on a few of the Boulder frequencies. The audio was usually at a very low level in the background when the channels were unmodulated, and was much too low to interfere with or degrade communications. When these channels were in use, none of the users appeared to experience any difficulties in their transmissions. (Western Ex. W19, pp. 16-17.)

45. Palmer Pyle's Discussions with Mr. Eldorado and Mr. Boulder. Prior to the time Mr. Eldorado filed an action, on July 18, 1988, to evict KQKS from the Site,⁶ Palmer Pyle, the General Manager of KQKS, would occasionally meet with him. (Western Ex. W18, p. 3; Western Ex. W22, p. 8; Tr. 873.) Pyle could not recall Mr. Eldorado ever discussing any problem with the two-way users at the Site hearing music on their repeaters. Pyle stated that most of their conversations involved discussions concerning how Western Cities would proceed with construction of the MSA. (Western Ex. W18, p. 3.)

46. Pyle also testified that Mr. Boulder telephoned him on one occasion in early 1988 to inquire about when KQKS was going to proceed with construction of the MSA. Pyle explained that an objection had been filed against their application at the FCC. Pyle described the telephone conversation as "very amiable." Mr. Boulder mentioned to Pyle that KQKS music could be heard in the background on some of his two-way repeaters. Pyle explained to him that KQKS' engineers had indicated the problem would be alleviated if they could move their antenna higher on the tower, and that whatever problems he was experiencing were caused by the close proximity of the KQKS antenna to the transmitter building. Pyle also explained that Mr. Eldorado had refused to permit KQKS to move its antenna higher on the tower because of other antennas. Mr. Boulder stated he would talk to Mr. Eldorado because he believed that KQKS

⁶ See paragraphs 49, 51 and 53, *infra*.

should be able to raise its antenna. Pyle stated that this conversation occurred before Western Cities was served with its eviction notice. (Western Ex. W18, p. 3; Tr. 1187.)

47. The Interference Complaints Resume. In the spring of 1988, Mr. Eldorado told Schipper there seemed to be an increasing problem of interference at the Site and that he had received a letter from Boulder concerning interference. Schipper contacted Mr. Boulder on April 26, 1988, to find out what the problem was. Mr. Boulder told Schipper the letter Mr. Eldorado referred to had been sent in late 1987 and did not name KQKS as the source of Boulder's interference problems. Mr. Boulder did mention, however, that he was having a problem with desense. Schipper asked whether there was a problem with KQKS audio on his repeaters, and Mr. Boulder said there was not. Schipper suggested that one way to determine the cause of the problem Boulder was experiencing would be to take measurements on its facilities with KQKS both on and off the air. Mr. Boulder told Schipper he planned to be at the Site to do some work on the night of May 1, and Schipper agreed to meet him at the Site at 10:00 p.m. on that date to conduct tests. Schipper arrived at the Site at approximately 10:00 p.m. on May 1, and waited for Mr. Boulder for approximately 40 minutes. Mr. Boulder never showed up. Schipper called Mr. Boulder the following day and suggested he contact him whenever it would be convenient for Mr. Boulder to meet at the Site to conduct tests. Schipper did not hear from Mr. Boulder again until July 28, 1988. (Western Ex. W19, p. 9.)

48. Western Cities began receiving interference complaints again in May 1988. With the exception of Metro Mobile, East Slope Radio, and C3 Communications, Schipper made calls to people with equipment at the Site and either learned that they did not have any problems, or he left messages to call him regarding the Site and he received no return responses. (Western Ex. W19, pp. 9-10.)

49. On July 15, 1988, Pyle signed an Amended Verified Complaint which was filed in the civil proceeding initiated earlier that month by Mr. Eldorado in Jefferson County, Colorado. Paragraph 13 of the amended complaint stated:

With respect to the alleged interference, any such interference is a direct consequence of the grounding of the existing tower, which is the responsibility of the defendant [Eldorado]. Moreover, the issue of interference is within the exclusive jurisdiction of the FCC and to the extent state or common law attempts to govern such issue, it is preempted from doing so by federal law.

(B/E Ex. 8, p. 2.) Pyle testified that this was Western Cities' position in the Colorado litigation. (Tr. 1006-07.)

50. On July 28, 1988, Mr. Boulder contacted Schipper and informed him that, sometime in the previous month, Mr. Eldorado had requested Mr. Boulder to provide him with a letter regarding interference. Mr. Boulder indicated he had complied with Mr. Eldorado's request, and provided a letter suggesting that Boulder's problems might be related to KQKS. Schipper asked Mr. Boulder to describe the problem, and Mr. Boulder explained that he had a little KQKS audio, and there were times when the inputs to his repeater seemed to "black out" for brief periods of time. Mr. Boulder also told Schipper that an intermodulation study had been computer-generated, and that he had conducted extensive tests at the Site, including disconnecting antennas and measuring equipment performance. Schipper testified that Mr. Boulder never provided KQKS with a copy of the intermodulation study. (Western Ex. W19, p. 10.)

51. Tillotson testified that after KQKS raised its antenna in December 1987, he heard nothing further about interference problems at the Site until around the middle of July 1988, when Mr. Eldorado filed a lawsuit in Jefferson County, Colorado, to evict KQKS from the Site. The eviction lawsuit included allegations that KQKS had not fulfilled its obligations under the lease agreement to construct the MSA and correct all interference caused by its operations. (Western Ex. W22, p. 8; B/E Ex. 5, pp. 127, 140.)

52. The July 1, 1988, Amendment and the Second Objection. In June 1988, KQKS was contemplating the installation of a new antenna which would make possible an increase in effective radiated power from the 5.2 kilowatts it operated with at the time to 9 kilowatts. (Tr. 1627.) On June 1, 1988, Schipper wrote a memo to Pyle which discussed the proposed power increase and installation of a new antenna. Therein, Schipper stated: "I think we need to resolve the question of exactly who [does] and who doesn't have interference on [the Site], once and for all" before the new antenna was to be installed. Schipper suggested sending a formal letter to all of Mr. Eldorado's customers, informing them of KQKS' plans, asking them "where they are, interference-wise," and offering to meet with their technical representative "to check it out." (B/E Ex. 14.) A week later, on June 8, 1988, Schipper wrote another memo to Pyle commenting that Mr. Eldorado had never mentioned in writing any interference except to Metro Mobile's facilities. Schipper also stated: "Just because somebody thinks there might be interference doesn't hold up. So, rather than stir up a hornet's nest before the fact, maybe we need to do our little mailing concurrently with our power increase." (B/E Ex. 15, emphasis in original.)

53. On July 1, 1988, Western Cities filed an amendment to its MSA Application. The July 1 amendment proposed permanent operation from the Site with the January 16, 1987, STA antenna facility. (B/E Ex. 5, pp. 76-77.) On July 18, 1988, 17 days after the amendment was tendered, Glaser, on behalf of Mr. Eldorado, filed a lawsuit in Jefferson County, Colorado, to evict KQKS from the Site. (*Id.* at 125-44.) In early August, Glaser filed two petitions to deny the July 1 amendment (collectively the "Second Objection"), one on behalf of Eldorado (filed on August 1), and the other on behalf of Eldorado's principal two-way tenant at the Site, Boulder (filed on August 8). (Western Ex. W22, p. 8; B/E Ex. 5, pp. 105-187, and 188-216.) Eldorado alleged, *inter alia*, that KQKS was "causing harmful interference to other lessees on the [S]ite" thereby breaching its lease with Eldorado and vitiating its reasonable assurance to use the Site. (B/E Ex. 5, pp. 106-14.) Similarly, Boulder alleged that KQKS was causing interference to repeater stations on the Site operated by Boulder which commenced operations at the Site prior to KQKS's arrival. Mr. Boulder gave a declaration claiming that KQKS was causing certain repeaters to operate with "reduced range" since February 1987, and that those complaints were persistent and came from long-time customers of Boulder. (*Id.* at 197-204.)

54. Additional Complaints (I). From the time the July 1 amendment and the Second Objection were filed until the lawsuit went to trial in April 1989, KQKS was the subject of numerous interference complaints. All but a few of the complaints submitted in support of the Second Objection stated that the problems the complainants were experiencing were of recent origin, *i.e.*, had arisen within the "last couple of months." The only change KQKS had made in its facilities at the Site since the previous December consisted solely of moving its antenna 20 feet higher on the tower. This change resulted in KQKS' facilities being moved farther from the equipment building which housed the two-way equipment that was allegedly receiving interference. (Western Ex. W22, pp. 8-9.)

55. Tillotson believed that any problem that had recently appeared could only be attributable to changes in equipment installed at the Site long after KQKS' arrival and its December 1987 modification of its facilities. Consequently, Tillotson did not believe it was Western Cities' responsibility under the FCC's newcomer policy to resolve the problems described by the complainants as having arisen in the "last couple of months." Nevertheless, Tillotson advised Schipper and Pyle to investigate the allegations and do whatever was necessary to resolve any problems attributable to the operation of KQKS which might be found to exist, regardless of whether the problems affected facilities that were installed at the Site before or after KQKS' arrival. (Western Ex. W22, pp. 8-9; Western Ex. W19, p. 11.)

56. Seeking the FCC's Assistance. Following the filing of the Second Objection, Tillotson contacted the attorneys for Mr. Eldorado and Mr. Boulder to explore the possibility of the parties working together in an cooperative effort to resolve the interference problems upon which the Second Objection was based. After this proposal was rejected, Tillotson contacted the FCC's Mass Media Bureau to request its assistance in bringing the parties together in order to resolve the complaints through a cooperative effort. (Western Ex. W22, pp. 9-10.)

57. A meeting was held at the FCC's Washington offices in late October 1988. The meeting was attended by Glaser as counsel for Mr. Eldorado and Mr. Boulder, Tillotson, and Jan Gay, Norma Bell, and Robert Greenberg on behalf of the FCC. After an airing of the dispute between the parties, the FCC encouraged the parties to work together in an cooperative manner to analyze and resolve the problem. Tillotson suggested that the FCC become actively involved in helping to resolve the dispute by arranging to have a representative of its Denver field office visit the Site with representatives of both parties to determine whether there was, in fact, "interference," and, if so, what was causing it. Tillotson explained that such active participation by the FCC was essential to resolving the dispute because Mr. Eldorado was seeking to evict KQKS from the Site in a Colorado civil lawsuit which involved allegations of interference. Tillotson believed a neutral third party was needed to mediate the dispute. The FCC declined to ask its Denver field office to get involved on grounds that it was not the responsibility of the field office to resolve "private disputes." (Western Ex. W22, p. 10.)

58. On October 28, 1988, Glaser wrote a letter to Lance Astrella, Western Cities' Denver counsel, pledging the full cooperation of Eldorado and Boulder in a effort to determine the cause of the interference, and making the transmission facilities at the Site available to Western Cities' consultants. (B/E Ex. 5, pp. 653-54.)

59. Two months earlier, on August 18, 1988, Schipper had received a telephone call from Steven Linn at the Denver FCC office regarding complaints from other users at the Site. Most of the complaints concerned music in audio transmissions. Linn mentioned complaints from Boulder and Joslins Department Stores ("Joslins"), a Boulder customer., and asked if KQKS had any plans to go higher on the tower to get away from the communications building. Schipper explained that KQKS had been attempting to move higher on the tower for a year, but that plan had been tied up in litigation. Schipper invited Linn to visit the Site, but Linn stated he did not believe it was necessary at that time. (Western Ex. W19, p. 10.)

60. Tillotson stated that he made two requests to Jan Gay during the fall of 1988 that the Commission send its engineering staff to the Site to listen to the background music and determine whether it constituted "interference," but the Commission refused. (Tr. 2467-68, 2621-22.) At the time, Gay was the Assistant Chief of the Bureau's Audio Services Division. (Official notice taken.) Because Western Cities' consultants could find no evidence of actual interference to the two-way facilities at the Site, Pyle spoke to the FCC's engineer in charge of KQKS' radio district and people in the FCC's Denver office at various times asking them to send someone to check out the situation because KQKS wanted to determine whether there was a problem which they had been unable to isolate. Pyle was advised by the FCC's Denver office that the problem was "between you two." Pyle interpreted this to mean that it was between KQKS and Mr. Eldorado. (Western Ex. W18, p. 4.)

61. The Efforts and Conclusions of Timothy C. Cutforth. After the Second Objection was filed, Tillotson had several discussions with Dawson concerning the allegations that KQKS' signal could be heard on two-way systems operating from the Site. Tillotson was seeking to understand what might be causing this phenomenon, and solicited Dawson's advice as to the steps KQKS might take to eliminate the problem. (Western Ex. W22, pp. 10-11; Tr. 2602-03.) Tillotson sought Dawson's advice on these matters because he knew that, in addition to his qualifications as a communications consulting engineer, Dawson had been the site manager at one of the more congested and difficult sites in the country, Cougar Mountain in Seattle, and Tillotson believed that Dawson's insights as an experienced site manager would provide him with a better understanding of the problems that were alleged to exist at Eldorado Mountain. (Western Ex. W22, pp. 10-11.)

62. Dawson attended Harvard College and had taken additional course work in mathematics and physics at Portland State University and the University of Washington. In addition to performing radio and telecommunications engineering projects of all types for private organizations and businesses, government agencies of the United States and foreign governments, and international organizations, Dawson participated in a meeting of CCIR Study Group 12-1 relating to electromagnetic compatibility matters (a term which means the quantification and control of interference) between FM broadcasting stations and intermodular communications and navigation systems. (Western Ex. W21, pp. 1-2.)

63. Dawson had undertaken many projects at multiple use transmitter sites which involved making measurements and ameliorating interference problems among users. As noted above, he also managed an FM/two-way radio communications site at Cougar Mountain for over

10 years. Dawson had encountered many problems involving electromagnetic compatibility between FM broadcast stations and other users, specifically land mobile system receivers. He was also familiar with the design and testing of land mobile systems, and had designed extensive systems of land mobile facilities for public safety agencies. (Western Ex. W21, pp. 1-2.)

64. In the course of Tillotson's discussions with Dawson, Dawson directed Tillotson to the definitions of "interference" and "harmful interference" contained in Section 2.1 of the Commission's Rules. (Western Ex. W22, p. 11; Tr. 2599.) This section defined "interference" as:

The effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radio communication system, manifested by any performance degradation, misinterpretation, or loss of information which could be extracted in the absence of such unwanted energy.

This section also defined "harmful interference" as:

Interference which endangers the functioning of . . . safety services or seriously degrades, obstructs, or repeatedly interrupts a radio communication service[.]

(Official notice taken.)

65. Dawson explained that the mere fact KQKS' signal could be heard on two-way radio channels did not mean KQKS was causing "interference" to those channels. Dawson stated that the music which allegedly could be heard on the channel was, for purposes of determining whether "interference" was present, no different from other types of background "noise." According to Dawson, some background noise is always present, and the question of whether noise constituted "interference" depended on the strength of the noise relative to the desired signal. Dawson stated that so long as the noise did not significantly degrade the quality of the communications on the channel, that noise would not be considered "interference." (Western Ex. W22, p. 11; Tr. 2460.) Dawson further explained that the level of noise that was acceptable on communications channels varied depending upon the type of communications going over the channels. (Western Ex. W22, p. 11; Western Ex. W21, pp. 5-6.) Tillotson acquired this understanding of the term "interference" under FCC Rule 2.1 sometime in late September or early October 1988. (Tr. 2460-61.)

66. During his conversations with Dawson regarding the interference allegations, Tillotson also asked Dawson to recommend a consulting engineer in the Denver area who Western Cities could retain to assist Schipper in his investigation of the interference complaints, and in finding a solution to whatever problem existed. Dawson recommended Timothy C. Cutforth, P.E., of the firm of Vir James and Associates. Western Cities hired Cutforth in November 1988 on the basis of Dawson's recommendation. (Western Ex. W22, p. 12; Western Ex. W19, p. 11; Tr. 1849-50.) For reasons relating to the civil litigation in Colorado between Mr. Eldorado and Western Cities, Cutforth was retained as a consultant to Western Cities' counsel in the civil litigation, rather than directly by Western Cities. Cutforth's responsibility was to determine whether KQKS was causing any problems to other facilities at the Site regardless of whether those facilities preceded KQKS' arrival at the Site, or whether any problems discovered constituted "interference" as defined by the Commission's rules. Cutforth also was to make recommendations as to how any problems identified could be resolved. (Western Ex. W19, pp. 12-13; Western Ex. W20, p. 1; Tr. 1852, 2376-77.)

67. Cutforth stated that "interference," in the traditional sense, occurred only when communications were significantly degraded so that messages were not easily conveyed. According to Cutforth, the mere annoyance caused by music being heard in the background did not meet the traditional criteria of "interference" when the music level was so low that speech intelligibility was not compromised. (Western Ex. W20, p. 2.)

68. Cutforth's efforts in 1988 and 1989 consisted largely of observing the operation of the radio repeaters which Mr. Eldorado and Mr. Boulder represented as having the worst problems, on the theory that any repair or modification that improved the operation of those repeaters would almost certainly reduce or eliminate the lesser complaints. Cutforth also monitored several of the two-way frequencies on the scanner located in Schipper's office at the KQKS studios. (Western Ex. W22, pp. 1-2.)

69. On his several trips to the Site, Cutforth found that the repeaters Mr. Boulder complained of proved to have very slight problems. In the event he was not witnessing the worst conditions, Cutforth requested Mr. Boulder and Mr. Eldorado to notify him whenever any interference might occur. Neither Mr. Eldorado nor Mr. Boulder ever telephoned Cutforth complaining of interference, and any reports Cutforth received concerning interference went through the KQKS staff rather than directly through him as he had requested. (Western Ex. W22, pp. 2-3; Tr. 1963.)

70. At various times, Mr. Eldorado and Mr. Boulder described the problems as being due to "spurious," "intermodulation," "harmonics," "desense," or "overpower operation" by KQKS. Cutforth never observed any spurious or intermodulation product even in tests at the output of the KQKS transmitter, or at the receiver inputs. The harmonic measurements made with the KQKS fundamental trapped out to prevent overloading the analyzer indicated that KQKS was in compliance with FCC requirements whether measured at the transmitter output or with an antenna on the Site. Cutforth stated that the KQKS transmitter was being operated at the nominal power authorized, and he checked it during each of his visits. Because the operation at the reduced power authorized required a major change such as turning off the breaker to the screen voltage supply, Cutforth explained that it was not possible for the power to be significantly altered by remote control in his absence. (Western Ex. W20, p. 3.)

71. Cutforth also stated that no symptoms of desense were ever demonstrated or observed in his tests of the repeaters. The only repetitive and traceable symptom Cutforth witnessed was "music playing in the background." Over the six-month period in which Cutforth studied the Site, he never observed music levels that were high enough to impede communications. While monitoring the two-way communications on Schipper's scanner, Cutforth never heard anyone say "I can't hear you" or "would you repeat that?" (Western Ex. W20, pp. 3-4.)

72. Cutforth found that the music effects were quite variable. He noted as much as 20 percent modulation for short bursts on his December 22, 1988, visit. Cutforth stated that two-way radio communications should be fully intelligible at this level of modulation. The loudest he ever heard the music on the two-way frequencies was the first time he visited the Site in November 1988. However, the levels at that time also were not high enough to interfere with the intelligibility of the two-way radio communications. (Western Ex. W20, p. 16.)

73. Cutforth stated that the music he heard on Mr. Eldorado's walkie-talkie sounded like it was coming from a radio with a small speaker. Because the KQKS modulation was a wide-band phenomenon and the repeater receivers were narrow-band devices, the repeater receiver would detect any direct or intermodulation product of KQKS in a very loud, distorted, and non-musical manner. Cutforth explained that the fact the music was quite clear, undistorted, and rather low in level, when present at all, indicated the receiver RF and detector stages were not the source of the music. In Cutforth's opinion, the music was not coming from the portion of the repeater intended to receive signals, but was being introduced at a later point. Cutforth was convinced that the repeater was not responding to antenna input of either direct RF on the KQKS

frequency, spurious outputs from the KQKS transmitter, harmonics of the KQKS frequency, or intermodulation involving the KQKS frequency. (Western Ex. W20, pp. 16-17.)

74. Cutforth and Schipper were not able to conduct tests with respect to the buzzing and clicking which they were advised was heard on the repeater after they installed filters on December 22, 1988, because Mr. Eldorado refused to grant them access to the repeater circuitry. Cutforth believed the buzzing and clicking may have been caused by the NOAA "swept frequency" radar which was operated at Stapleton Airport. Cutforth also stated that the reported problem may have been due to changes in the location of cables and grounding on the Site which he and Schipper could not observe on a regular basis without invitation. (Western Ex. W20, p. 17.)

75. Cutforth and Schipper went to the Site to inspect the KQKS transmitting facilities on November 16, 1988. (Western Ex. W19, p. 11.) They were not able to coordinate a visit to the communications building, but viewed the tower layout and the KQKS facilities. Measurements of the spectrum made from the transmitter output showed no spurious or intermodulation mixes. The measurements indicated that the transmitter harmonics were 80 dB down and more. Cutforth stated that this level would not impact on the intelligibility of two-way communications on any of the frequencies in use on the Site. However, he found a strong sweeping carrier crossing the whole UHF spectrum from time to time which was not related to the KQKS operation. Cutforth believed the sweeping carrier was caused by the NOAA "swept frequency" radar system referred to above. (Western Ex. W20, p. 4.)

76. On November 17, 1988, Cutforth and Schipper again went to the Site to make preliminary measurements of KQKS signal levels in and around the communications building where the two-way equipment was housed. (Tr. 1520.) Mr. Eldorado and Larry Ellis, Mr. Eldorado's consulting engineer, were also present. (Western Ex. W19, pp. 11-12.) Cutforth was able to measure RF levels inside the communications building and measure some RF levels on an unused combiner and receive port. The RF levels were not alarmingly high, but Cutforth determined that the shielding of the building was not effective because he obtained similar RF readings inside and outside the building. (Western Ex. W20, pp. 4-5.) Cutforth stated that the approximately 10 mV KQKS level observed at the combiner receive port indicated a signal level too low to cause problems in the operation of the receivers. (*Id.* at 5.) Because Mr. Boulder was not present at the Site, Cutforth and Schipper were not authorized to make a detailed inspection of Boulder's equipment, including the unit leased by Joslins. (Western Ex. W19, p. 12.) They were allowed to review the Boulder equipment and touch the antenna cables, but were not

permitted to open the front covers or make measurements on any of the connections. (Western Ex. W20, pp. 4-5.)

77. Cutforth noticed there were curly cord microphones hanging from the front of several of the units. His inspection and measurements showed that much of the RF energy in the building was entering on the coax cables. When Mr. Eldorado keyed up the repeater with his walkie-talkie, Cutforth heard music during the squelch tail. However, because there was no traffic on the channel, it was not possible to compare the music level with actual communications. (Tr. 1862, 1998.) Schipper stated that the audio level was very low and would not interfere with or degrade communications on the channels. (Western Ex. W19, p. 12.) Cutforth stated that he had used walkie-talkie radios in the presence of broadcast stations before, and was aware that they could pick up unwanted signals all by themselves. He personally experienced situations where the walkie-talkie picked up the broadcast station directly and played the radio station's signal through the speaker. Thus, Cutforth did not believe Mr. Eldorado's test at the Site with his hand-held radio was valid. (Western Ex. W20, p. 5; Tr. 1862-63.) In Cutforth's opinion, the music he heard on Mr. Eldorado's walkie-talkie during his November 17 visit, and also on later visits, did not rise to the level of interference. (Tr. 2029.)

78. Cutforth believed there was inadequate shielding to the circuit which was detecting the music. Cutforth stated that the level of RF observed on his visits to the Site were all lower than he had seen at other multiple-use sites where two-way communications took place in the normal course. The levels he measured on the Site on November 17, 1988, were low considering the close proximity of KQKS' transmitting antenna. Cutforth measured very similar levels outside and inside the building, and the ambient levels were fairly consistent over the entire area. (Tr. 1979-80.)

79. On one of his visits to the Site, Cutforth noted that the low-level music was unusually clear and undistorted. He explained that the two-way communications audio as heard on the channel was obviously of good quality for low-level music in the background to be clearly audible above the background noise. Cutforth stated, however, that the two-way communications were not in any way marginal communications, and the music did not render the communications unintelligible. (Western Ex. W20, p. 17.)

80. Cutforth also noted that an MMDS transmitter with an oval wave guide was installed in the room with Mr. Boulder's radios in late November or early December 1988. Cutforth believed that the MMDS installation, which brought a new ungrounded cable through the building

shield, could have significantly increased the RF carried into the building thereby making any problem with direct RF ingress into the equipment circuitry more severe. (Western Ex. W20, p. 18.)

81. Cutforth further stated that during the period he was visiting the Site, an antenna was mounted on the tower in such a manner that it touched the RADOME of the KQKS antenna. Cutforth explained that a RADOME is an antenna cover designed to keep ice from forming on the antenna. The RADOME on the KQKS antenna was a fiberglass ball slightly larger than the antenna ring element itself. Cutforth stated that the antenna that was in contact with the KQKS antenna would be expected to pick up a huge amount of signal from the KQKS antenna, and conceivably could pick up enough signal to destroy any radio attached to it. It almost certainly would have caused interference problems if connected directly to a radio. Although Cutforth and Schipper inquired as to what users were attached to that antenna, Mr. Eldorado never provided them with this information. (Western Ex. W20, p. 18.)

82. Cutforth noted that the condition of radio receivers was important. (Western Ex. W20, p. 14.) He explained that radios can have RF enter on other than RF connecting wires without what he would interpret as interference. Cutforth stated that nearly any part of an electronic device can detect RF energy and decode it to play music. This means that whether the RF energy was coming into the repeater from the antenna, the power cord, the microphone cable, through the interchassis wiring, or directly through the cabinet, the result may be music playing in the user's radio speaker. When the RF energy was being detected by a circuit beyond the repeater discriminator (detector) it was not due to the frequency of the impinging RF, the existence of harmonics, or intermodulation or desensitization of the receiver but, rather, to inadequate shielding of the circuit which was detecting the music. (*Id.* at 15.)

83. The symptoms Cutforth and Schipper observed indicated that this was the problem at the Site. In order to resolve the problem, Cutforth stated they needed to find the actual circuit that was detecting the music in order to determine the best method of eliminating it. This required access to the equipment circuitry to make the necessary tests. Cutforth stated that it was impossible to trace the interference because Mr. Eldorado and Mr. Boulder were unwilling to cooperate and permit Cutforth to conduct the necessary tests. Cutforth further stated that nearly all of the possible solutions required the full cooperation of the Site owner and users, and he and Schipper never received this cooperation. (Western Ex. W20, pp. 15-16.)

84. Cutforth and Schipper met with Mr. Eldorado, Mr. Boulder, and two representatives of Motorola at the Site on December 11, 1988, to investigate and attempt to correct Boulder's complaints concerning interference. (Western Ex. W20, p. 13; Tr. 1523-24.) On that occasion, Cutforth observed music levels which were quite low, and heard only short, hard-to-identify segments, making identification difficult and troubleshooting impractical. Cutforth noticed that the microphones which had been hanging from the panels of the repeaters were no longer present. He also noticed that some additional coax cables had been added to the building since the last trip but had not been grounded to the building shield. (Western Ex. W20, pp. 5-6.)

85. Cutforth made spectrum observations at the antenna connection to one of the Boulder repeaters with the KQKS transmitter turned on and off. Cutforth found there was no visible change in the noise floor in the UHF band when the KQKS transmitter was turned on. He repeated the test with the receiver preamplifier in line and the same results were obtained. In later tests, a 0.2 microvolt signal was injected into the spectrum analyzer with the same knob settings on the analyzer for comparison. The 0.2 signal was clearly visible above the noise floor of the spectrum analyzer, indicating the spectrum analyzer noise floor to be significantly lower than 0.2 microvolts. Cutforth stated that the significance of this result was that if there was noise at the Site that could have interfered with radio communications, it would have been clearly visible and measurable. According to this test, there was none. Cutforth also noted that the low noise preamplifier on the receiver reduced the KQKS signal coming in from the antenna by more than 30 dB, minimizing the possibility that the strength of KQKS' signal was desensitizing the receiver front end. Mr. Boulder stated that he had added the same noise preamplifier to most of his units. (Western Ex. W20, p. 6.)

86. Based on these measurements and the RF measurements taken during the November 17 Site visit, Cutforth and Schipper concluded that the RF level from KQKS was too low to desensitize any of the two-way equipment located at the Site. Although Schipper again heard KQKS audio on one of Boulder's channels during this December 11 visit, the level of the audio was lower than what he had heard during their November 17 visit to the Site. Schipper also noted that chokes were installed on one of Boulder's repeaters during this December 11 visit. (Western Ex. W19, pp. 13-14.) As of December 11, 1988, Cutforth had reached the conclusion that he and Schipper "were chasing rather small problems," and that it was going to be difficult for them to observe because of its minor nature. (Tr. 1872-73.)

87. On March 13, 1989, Schipper and Cutforth met with Robert Dirnberger of the State of Colorado Wheat Ridge Regional Center ("Center"), one of the repeater users identified by

Boulder as receiving interference. Dirnberger reported that his service on the repeater frequency was much better than service on their local use channel, but that Boulder had requested they limit their use of the repeater frequency due to crowding on the frequency. Dirnberger also stated he repeatedly called Boulder to pick up his radios for repair, but Boulder had not responded. (Western Ex. W20, p. 14.)

88. While at the Center, Cutforth and Schipper inspected the Center's Boulder-supplied MAXON Model CP-0520 radios and found them in a general state of disrepair. (Western Ex. W20, p. 14.) Cutforth stated that their equipment was in "abominable condition and practically unusable." (Tr. 2007-08.) Two radios suffered from battery packs with lowered output voltage, possibly due to shorted cells. One radio appeared to have a damaged speaker/microphone which generated a rattling, fuzzy sound. Another radio was more than 19 kHz removed from the assigned transmit frequency. The same radio transceiver would not receive on the Center's local use frequency. Cutforth also noted that the transceivers had bad antenna fittings that did not make full-time contact with the antenna. The antenna fittings showed signs of major wear and carbonization, possibly due to arcing. Cutforth and Schipper found that the transmission was very intermittent depending on how the antenna and transceiver were held. A rough antenna feed to a basement room in the building had a bad connector, making service from that location intermittent as well. (Western Ex. W20, pp. 14-15; Western Ex. W19, p. 19.)

89. During tests conducted at the Center, Cutforth could discern no degradation or problems attributable to KQKS even when pressing his ear to the transceiver speaker. Cutforth and Schipper listened to their channel the same time they keyed up the one working radio, but they did not hear music on the channel. Dirnberger stated that the Center had not been using the radios because they had been inoperative for all purposes for quite some time, and Mr. Boulder had not responded to their request to have them repaired. (Western Ex. W20, p. 15.) Based on the condition of the radios at the Center, it appeared the problems regarding reduced range or static Boulder claimed its customers were having may have been due to the condition of the mobile or portable units themselves, and had nothing to do with the repeaters on the Site. (Western Ex. W19, p. 20.)

90. The effects of modifying the grounding system reduced the RF inside the building dramatically. However, Cutforth was not able to make measurements after he had finished his modifications to the grounding system because he and Schipper did not have access to the inside of the building at that time. (Tr. 2088-89.) When monitoring the scanner in Schipper's office after making the changes, Cutforth heard routine communications with no audible KQKS music

on the scanner. Schipper reported to Cutforth that he too no longer heard KQKS music playing on the channels after that date. (Tr. 2090.)

91. On many occasions, Cutforth and Schipper made oral requests for a complete diagram of the tower showing the specific users and frequencies in use for each antenna. The diagram was provided in April 1989 in response to a written request, but did not contain sufficient information to enable Cutforth and Schipper to evaluate the existing tower to determine the practicality of moving the KQKS antenna higher on the tower. Without Mr. Eldorado's approval to move the KQKS antenna higher on the tower, Cutforth believed the only solution in the immediate future to the interference complaints was to change KQKS' antenna design. (Western Ex. W20, pp. 18-19.)

92. In April 1989, KQKS installed a half-wave, two-bay antenna on the tower. On the day following its installation, Cutforth went to the Site to measure the performance of the new antenna. Cutforth then shortened the antenna cable grounding straps on all the cables going into the communications building, and installed metal plates so they could be shortened to a very short length. Cutforth stated that the half-wave antenna reduced the RF fields by approximately 10 dB all around the building. This had the effect of reducing the RF signals into the building from KQKS by at least 10 dB. (Tr. 2086-88.)

93. None of the tests Cutforth conducted during the period from November 1988 through April 1989 indicated there was a problem related to KQKS which would result in degrading or desensing two-way voice communications on the repeaters located at the Site. While monitoring Schipper's scanner, Cutforth never witnessed any interference from KQKS to two-way communications from the Site. Cutforth stated that the low level of music he observed was never at a level that would have prevented effective communications. (Western Ex. W20, p. 20.)

94. The problems Cutforth observed at the Site all seemed to result from direct ingress of RF into exposed circuits in each radio system. Cutforth and Schipper were not permitted to install filter capacitors or apply shielding on the exposed wiring or circuits to eliminate that source of pickup, nor were they permitted to make measurements of the effectiveness of such filtering. Cutforth believed the RF levels inside the communications building were clearly being exacerbated by the apparent haphazard installation and grounding of incoming coax cables which were added at regular intervals. Cutforth and Schipper were unable to do anything about the grounding of the coax cables in the absence of a specific agreement from Mr. Eldorado and the Site users. The ungrounded coax cables made it difficult to reduce the RF levels inside the

communications building, and the refusal to allow improved shielding and filtering of unshielded circuits and wiring made it very difficult to lower the inherent pickup levels of the repeater systems. Nevertheless, Cutforth stated that the observed effects were very mild and did not interrupt or interfere with communications on the two-way systems. (Western Ex. W20, pp. 9-10.)

95. Cutforth proposed a number of solutions which varied in complexity. Although it was not necessary for all of them to be applied at once to prevent RF energy from entering the repeater equipment, Cutforth believed consistent efforts needed to be taken to eliminate all complaints. He also stated that nearly all of the remedies required the cooperation of Mr. Eldorado and the Site users, but he and Schipper were never able to obtain such cooperation. (Western Ex. W20, p. 10.)

96. In Cutforth's opinion, the most "global solution" would have been to complete the job of properly shielding the building. Cutforth believed this would have eliminated concern with RF levels existing outside with respect to the possibility of interference entering the repeaters through the cabinets and wiring. Mr. Eldorado would not allow Cutforth and Schipper to coat the floor of the transmitter building with metallic paint to better shield the transmitter building. Mr. Eldorado believed that making the floor conductive would have been hazardous to the technicians working in the building. Cutforth stated that had he and Schipper been permitted to use metallic paint to coat the floor, they would have then covered the floor with linoleum or some other type of insulation, and there would have been absolutely no hazard to people working in the building. Cutforth also noted that full shielding of the building would have required grounding of all present and future coax cables as they entered the building. Mr. Eldorado refused to permit the installation of a standard grounding feedthrough bulkhead because it would have involved cutting the existing coax cables and taking some of the repeaters out of service while the cable fittings were installed. (Western Ex. W20, pp. 10-11.)

97. Based on his work at the Site, Cutforth observed that the radiation from KQKS around the cables was much higher than necessary. (Western Ex. W20, p. 11; Tr. 1921.) The RF was clearly following the cables into the equipment building. If the building shielding were effective, the RF levels would have been nearly constant throughout. However, the high levels indicated the cables themselves were breaching the building shielding and bringing the undesired signals inside. Cutforth stated that if the interference reported was coming from RF levels existing at the radio equipment cabinetry, as he believed, then the RF coming into the building was very likely the major contributor to the complaints. Cutforth explained that the cables

entered the building in tightly grouped bunches through holes which had been cut in the building wall. Access to the shielding for grounding was difficult because of the close grouping of the cables and the fact the shielding had been covered with wood siding so that very little of the shielding was exposed for making connections. Some of the cables had long heads attached which were about a foot away from the building wall. The long heads were on cables which had been installed by KBCO prior to the time Cutforth began visiting the Site. Cutforth was advised that KBCO did not want to have the cables touched by other technicians. The KQKS RF levels on the cables entering the building were higher than the ambient levels. In Cutforth's opinion, this was caused by the inadequate scheme for grounding the coax cables. (Western Ex. W20, pp. 11-12.)

98. Cutforth stated that a full enclosure of the transmitter building was impractical until it was guaranteed that each of the cables passing through the closure was properly attached to it. The cables Cutforth observed passing through the closure were not properly attached because many had no grounding strap installed at all. Cutforth also stated that many new coax cables were installed during the period he was working at the Site. Although he did not personally witness the installation of any new cables through the wall of the building, cables were installed through the wall between each of his visits, and rarely were they installed with grounding to the building shield. Cutforth explained that each and every cable not properly grounded to the building shield brought RF energy into the building which degraded the effectiveness of the building shield and increased the RF energy level within the building. The early measurements taken by Cutforth and Schipper showed that, from their first visit to the Site, the effectiveness of the building shielding wall was nil and, with the addition of each new cable, the prospects for effective building shielding decreased. (Western Ex. W20, p. 12.)

99. Cutforth was unable to conduct field tests of desense because Mr. Boulder never provided him or Schipper with a list of locations where the users had previously been able to use their two-way receivers, but were now unable to do so. Based upon Cutforth's measurements of RF levels in November and December 1988, he concluded that the facilities in the transmitter building were not being desensitized by the operation of KQKS. In his experience, the level of RF radiation in the building or on cables entering the equipment would have to have been much higher to have caused any desense. Cutforth believed his opinion was subsequently confirmed by comparison tests using test equipment which showed that the receivers tested were not susceptible to signal levels many times greater than those arriving at the receive antenna from KQKS. No change in noise or apparent receiver sensitivity was noted in those tests. Cutforth testified that it was his understanding that, at the direction of the FCC, Mr. Eldorado and Mr.

Boulder provided Western Cities with a list of desense locations in the spring of 1989. (Western Ex. W20, pp. 12-13.)

100. Cutforth and Schipper Report to Tillotson and Pyle. After Cutforth's visits to the Site in November 1988, Cutforth gave Tillotson a report by telephone concerning his observations of the phenomena complained of and his tentative conclusions. (Tr. 2455.) Cutforth reported to Tillotson that he had taken measurements of the RF levels within the building in which the two-way equipment, which allegedly was being subjected to interference, was housed. Cutforth informed Tillotson that, based on his measurements of the RF levels and his other observations, he detected no evidence that any of the facilities in the building were being desensitized by KQKS. Cutforth also explained to Tillotson that in order for desense to occur, the level of RF radiation inside the equipment building, or on cables entering the equipment, would have to be much higher than the RF levels he measured. Cutforth also informed Tillotson that he had heard KQKS audio on one or more two-way channels over a hand-held unit provided by Mr. Eldorado, but the music was at such a low level that it would not have interfered with normal voice communications on the channels. (Western Ex. W22, p. 13.)

101. Schipper reported his observations to Tillotson following his visit to the Site on November 17, 1988. (Tr. 1552.) Cutforth and Schipper also reported the findings of their November 17 visit to the Site to Pyle. (Tr. 1864.) Cutforth stated that after each of his visits to the Site, he returned to the KQKS studios and discussed his findings and observations with Schipper and Pyle. (Western Ex. W20, p. 11; Tr. 968.)

102. Following Cutforth's December 11, 1988, visit to the Site, Cutforth gave Tillotson another detailed report on what he had observed. In this report, Cutforth stated that the primary complaint of Mr. Eldorado and Mr. Boulder, that KQKS' signal could be heard over two-way frequencies, was barely observable, and to the extent it could be observed, the level of KQKS' signal was so low it could not reasonably be said to interfere with, or degrade, communications on the two-way channels. Cutforth also told Tillotson, again, that he was unable to detect any evidence that KQKS was causing desense interference at the Site. (Western Ex. W22, p. 14.)

103. Joslins' Complaints and the Installation of the Capacitors. On December 22, 1988, Schipper spoke with Barry Sebastian, the director of loss prevention and safety for Joslins. (Western Ex. W19, p. 14; Tr. 2732.) Joslins was primarily a soft goods department store, and did about \$250 million in annual sales in the Denver area. (Tr. 2735-36.) Sebastian supervised 110 employees, including 60 loss prevention agents who used Joslins' two-way radio system. (Tr.

2732, 2734.) Sebastion negotiated Joslins' lease of a repeater at the Site from either Mr. Eldorado or Mr. Boulder. (Tr. 2858-59, 2861-62.) Sebastion testified that Joslins started using two-way radios eight or ten years before his testimony (*i.e.*, between 1982 and 1984). (Tr. 2889.) Sebastion stated that his "responsibility is to my people[,] and my people's safety relies on this communication ability." (Tr. 2762-63.) The address on Joslins' FCC license was 301 East Chester, Lafayette, Colorado. Sebastion believed that was Mr. Eldorado's address at the time Joslins first obtained an FCC license. (Tr. 2863.) Sebastion testified that he did not have any problem with KQKS audio until June or July 1988. (Tr. 2751, 2891.)

104. On October 10, 1988, Sebastion executed a statement which was submitted to the Commission in connection with the Second Objection. In his statement, Sebastion complained that music from KQKS was heard on the channel used by Joslins' security personnel. (B/E Ex. 5, p. 615.) In a letter to the Commission dated October 20, 1988, Sebastion alleged that the music on the Joslins frequency had made it impossible for their security officers to communicate with each other during the apprehension of a shoplifter, and one of their agents could have been injured as a result. (*Id.* at 651.) Sebastion claimed that when the repeater was keyed, music came out over the system that was so loud it made their agent's voice inaudible. (Tr. 2765-66, 2768.) According to Sebastion, the incident described in his October 20, 1988, letter occurred over a three-day period in which the Joslins frequency was rendered completely unusable due to KQKS music. (Tr. 2770-71, 2827-28.) Sebastion testified that, other than the three-day period when they were continuously unable to communicate, all of their problems were intermittent, *i.e.*, they would come and go. (Tr. 2819-20.) He also claimed he told Diane Kaiser, one of Joslins' attorneys, about the three-day problem period. (Tr. 2829.)

105. Schipper stated he had telephoned Sebastion on a number of occasions and requested Sebastion to contact him directly whenever he was experiencing difficulties with the Joslins frequency so that Schipper could monitor the channel in order to better understand the problem. (Western Ex. W19, p. 15.) Sebastion claimed that during his conversations with Schipper, he told Schipper the music was so loud he could not hear the radio. (Tr. 2776-77.) Schipper testified that during their conversation on December 22, 1988, Sebastion said he had not noticed any serious problems lately. However, on the same day, Mr. Eldorado claimed Sebastion had called him on December 17 complaining that the interference was so bad the Joslins system was unusable. (Western Ex. W19, p. 14.) Sebastion could not recall what he told Schipper in their December 22, 1988, telephone conversation. He believed they would have discussed whatever the symptoms were at the time. (Tr. 2832-33.)

106. Also on December 22, 1988, Cutforth and Schipper, along with Mr. Eldorado, Mr. Boulder, Robert Foley (a Boulder employee), and Joseph Benkert (one of Boulder's attorneys), returned to the Site and tested the Joslins repeater. (Western Ex. W19, p. 14.) Cutforth observed that the music levels varied widely from totally inaudible to short bursts of as high as 20 percent modulation on the unit being observed. (Western Ex. W20, pp. 6-7; Tr. 1933.) Cutforth stated that 20 percent modulation was not high enough to prevent effective communications on a channel, but was high enough to facilitate some testing. (Western Ex. W20, pp. 6-7.)

107. According to Mr. Boulder, the Joslins repeater unit represented the worst problems, and he made only passing note of the other units in his system. Cutforth found that when the front panel access door on the receiver was opened or moved, the music levels changed noticeably. Cutforth connected a small wire across the door hinge to the radio chassis and found that the music levels dropped and became rather stable. Cutforth also stated that the PL tone encoder/decoder unit was the one unshielded unit in the system, and it had unshielded wiring connecting it to the receiver and transmitter. (Western Ex. W20, p. 7; Tr. 1867.) Schipper defined the term "PL tone" as a private line. With respect to two-way radios, he stated that it was a subaudible tone that basically allowed one repeater to accommodate multiple users without all the users having to hear all the other traffic. (Tr. 1640.)

108. As noted above, Cutforth described the music as being rather sporadic, with the highest level around 20 percent for a momentary "burst." (Tr. 1933, 2011.) After he and Schipper improved some of the bonding and attached the front panel of the equipment to the chassis, the music level dropped down to under 10 percent and then stabilized at that level where they were able to measure it. (Tr. 2011, 2098, 2100.) Cutforth explained that the significance of a 5 to 10 percent level of KQKS audio was that the modulation of music would be measurable on an analyzer above the PL tone. In reference to communications, a 5 to 10 percent level would be audible during any pauses and during the squelch tail, but would be masked by the speech during normal communications. (Tr. 2101.)

109. During his December 22, 1988, visit to the Site, Cutforth installed capacitors (100 and 200 picofarad values) on the PL terminal strip. The capacitors decreased the music level to well below the 5 percent modulation of the PL tone injection. Cutforth also noticed that the PL encode and decode levels had drifted, and they were reset by Mr. Boulder. (Western Ex. W20, p. 7.) After the capacitors were installed, Mr. Eldorado held up his hand-held radio and Cutforth and Schipper observed there was still very low-level KQKS audio present. Schipper testified there was no evidence of static or noise other than the low-level audio (Tr. 1732), and the level

of KQKS audio dropped almost to the point of inaudibility (Western Ex. W19, p. 14). Cutforth testified that the music was at a "very reduced level." (Tr. 1907.) He reported his observations of his December 22, 1988, Site visit to Pyle. (Tr. 1709, 1933.)

110. Cutforth stated that the level of music on December 11, 1988, was too low to measure and much more difficult to identify and quantify than on December 22. (Tr. 2012.) Cutforth explained these differences in the level of music by stating there were continuous changes taking place at the Site. Each time he visited the Site there was more equipment, more antennas, and more cables. (Tr. 2066-67.) He stated that any changes that affected the RF level in the building could change the susceptibility of the equipment. Cutforth noted that there were different antenna cables being added regularly, and the equipment in the building was being moved around, which changed the standing wave in the building from day-to-day. (Tr. 2012-13.)

111. After his visit to the Site on December 22, 1988, Schipper telephoned Sebastion and told him he and Cutforth had placed a modification on the repeater and asked him to call if he noticed any changes. (Tr. 1732-33.) Schipper wrote a letter to Sebastion on the following day, December 23, 1988, describing Cutforth's modifications and asking Sebastion to contact him immediately whenever the interference problem became noticeable. (Western Ex. W19, p. 14 and Ex. 2 thereto; Tr. 1733.) Schipper stated he had spoken with Sebastion before December 22, 1988, and Sebastion told him that he occasionally heard low-level audio on the Joslins frequency. (Tr. 1538.)

112. Schipper's Scanner (II). On December 23, 27, and 28, 1988, Schipper monitored the Joslins frequency on the scanner in his office. (Western Ex. W19, p. 14; Tr. 2741-42.) While monitoring the Joslins frequency of the Boulder repeater that Cutforth had modified, Schipper did not hear any KQKS audio, nor did it appear that any of the users of that frequency were experiencing any difficulties in their transmissions. (Western Ex. W19, p. 14.) Schipper heard only normal communications taking place. (Tr. 1733.) The KQKS audio had dropped so low it was no longer audible during the conversation. Schipper also did not hear any static when he monitored the Joslins frequency. (Tr. 1788.)

113. Schipper explained that he was generally in his office, and he would listen to the scanner while doing other work. (Tr. 1659.) While monitoring his scanner, he compared the level of the audio to the voice communications that were taking place. (Tr. 1657.) Prior to January 3, 1989, Schipper never heard a voice communication that was not clear and distinct because the music was too loud. (Tr. 1667.) He occasionally heard comments by the people

using the radio to the effect that they could hear the radio station, but he could not recall anyone ever having to repeat information. (Tr. 1667-68.)

114. Cutforth stated that he and Schipper listened to the scanner whenever they were in his office for any length of time because it was set up on the credenza behind his desk and set at a fairly high level. Whenever there was any traffic on the channel, it was very noticeable, and they would check to see which channel it was on and turn the volume up and listen carefully. (Tr. 2084.)

115. Pyle knew that Schipper had acquired a scanner and was monitoring the two-way frequencies from his office. Schipper told Pyle that he heard music in the background from time to time, but it never interfered with the two-way transmissions. Pyle stated he would go to Schipper's office on occasion and monitor the frequencies with him. In listening to the frequencies on the scanner, Pyle never heard KQKS music in the background of the two-way voice communications. The two-way radio communications were always clear and understandable. (Western Ex. W18, pp. 2, 4.)

116. The Removal of the Capacitors. After the capacitors were installed by Cutforth, Schipper learned that the voice transmissions over the Joslins repeater were being "masked by static," and that there was "muffled audio," which was described as "something similar to if you had a radio at home and you . . . turned the treble control down." (B/E Ex. 6, p. 192; Tr. 1548.) Schipper understood that the term "masked" meant that voice transmissions would be "less audible," "probably less intelligible," and "would probably be degraded." (Tr. 1544.)

117. On December 27, 1988, KQKS' Denver counsel received a letter from Boulder's counsel demanding that the devices installed on Boulder's repeater on December 11 and 22 be removed the following day. Also on December 27, Mr. Boulder telephoned Schipper and told him he wanted the devices removed immediately because two of his customers, Joslins and Mullen Security, had complained to him of lowered audio level and reduced frequency response. (Western Ex. W19, p. 15; Tr. 1547-48, 1557-58.) Schipper suggested that they meet at the Site the next day to attempt to identify the nature and cause of the newly discovered problem, and resolve it. However, when Cutforth and Schipper met Mr. Boulder at the Site on December 28, 1988, Mr. Boulder insisted that they simply remove the devices. (Western Ex. W19, p. 15; Tr. 1382.) He stated he would not permit any further work to be done on his equipment until his consulting engineer, who was out of town, could be present. (Western Ex. W19, p. 15.) Cutforth was not permitted to make any measurements before or after removing the capacitors to verify

the repeater performance in either state. (Western Ex. W20, p. 7; Tr. 1525-26.) He did note, however, that the PL tone levels had drifted once again and Mr. Boulder had to reset them. Cutforth stated that because PL tones were essential to the operation of a shared repeater system, it was clear that the drifting PL tones would have made the repeater system operate erratically in a manner which might have been misinterpreted as an indication that the repeaters were suffering from desense. (Western Ex. W20, pp. 7-8.)

118. Cutforth's Telephone Conversation with Tillotson. While at the Site on December 28, 1988, Cutforth had a telephone conversation with Tillotson. (Western Ex. W20, p. 8; B/E Ex. 27, p. 2; Tr. 1875, 2367.) Tillotson recalled that Cutforth was frustrated by the fact Mr. Boulder and Mr. Eldorado were complaining that they heard music after Cutforth had found a solution to the problem, but was forced to remove the capacitors. They also would not let him address the new problem of static or muffled audio, but wanted him to remove the equipment he had installed. (Tr. 2387.) Cutforth believed the installation of the capacitors was the final solution to the problems at the Site. He told Tillotson that if they were allowed to maintain the modifications throughout the system, he believed there would be no interference problem at all, not even an annoyance. In Cutforth's mind, the problem would have been resolved if Mr. Boulder and Mr. Eldorado would have let him leave the capacitors in place. (Tr. 2136-37.)

119. During the course of this conversation, Cutforth and Tillotson discussed the fact that even without the modification which they had removed, there was still only low-level music and it was not preventing communications from taking place. (Tr. 1937, 2043.) Cutforth reconfirmed the advice he had been giving to Western Cities that, based on his observations and tests at the Site, his monitoring of Schipper's scanner at the KQKS studios, and the standard definition of interference, *i.e.*, the impeding of effective communications, KQKS was not causing any interference to any of the equipment at the Site. (Western Ex. W20, p. 8.) Upon cross-examination, Cutforth testified that by "reconfirming" to Tillotson on December 28, 1988, that KQKS was not causing interference to equipment at the Site, he meant he had been telling Tillotson this fact all along. (Tr. 1935.) Cutforth testified that the interference symptoms which were present either on or before January 3, 1989, never rose to the level of causing the two-way voice communications on the repeaters operating from the Site to be unintelligible. (Tr. 2064.)

120. Additional Complaints (II). Schipper also spoke with Tillotson while Schipper was at the Site on December 28, 1988. (Tr. 1383, 1522.) Schipper informed Tillotson that Mr. Boulder had reported that KQKS audio was again being heard on the Joslins frequency once the capacitors were removed. (Tr. 1569-70, 1572-74.) Tillotson asked Schipper if he had spoken

with Sebastion to confirm that the problem he was having was the same as Mr. Boulder described. (Tr. 1737-38.) Sebastion did not call Schipper concerning the new problem that Mr. Boulder stated he had complained about. Schipper had attempted to contact Sebastion several times on December 27 and 28 to ask him about the problem that allegedly had developed as a result of the installation of the capacitors, but Sebastion had not returned his calls. (Western Ex. W19, p. 15; Tr. 1557-58.) Schipper told Tillotson he had been unable to contact Sebastion because Sebastion had not returned his calls. (Tr. 1738.)

121. Sebastion called Schipper on December 29, 1988, and told him that static was no longer a problem after the capacitors had been removed, but he was again hearing KQKS audio. (Western Ex. W19, pp. 15-16; Tr. 1553-54, 2780, 2784, 2842.) Sebastion testified that the music did not prevent Joslins from communicating, but described it as "sound[ing] like a radio being played in the background of a telephone conversation loudly." (Tr. 2784-85.) Sebastion claimed he also told Schipper that the Joslins employees had to repeat themselves over the radio. (Tr. 2785.) Sebastion later admitted that he had only a general, rather than specific, recollection of this conversation, and that he could not recall with any certainty whether he told Schipper that the employees had to repeat themselves over the radio. (Tr. 2846-48.)

122. Because of the problem he had experienced with KQKS audio in the background of the Joslins frequency, Sebastion claimed he considered buying a new repeater or changing the crystals in his base station and hand-held radios. (Tr. 2876-78.) He stated that the cost of purchasing and installing new crystals in his 60 hand-held radios would have been \$60 per radio, or approximately \$3,600. Sebastion testified that he did not have the budget for it at that time, nor did he request additional funds from the Joslins management. (Tr. 2878-79.)

123. Sebastion complained of static only during the period when the capacitors had been installed. He did not hear static after they had been removed. (Tr. 1792.) Cutforth could not understand how the capacitors could have generated static. (Tr. 1793.) Schipper and Cutforth did not believe the modifications they made on December 22, 1988, were causing muffled audio or static. Schipper had been monitoring his scanner and heard only normal communications taking place the entire time. (Tr. 1769.) Schipper and Cutforth believed the claims of hearing static may have been fabricated in light of the pending litigation in Colorado between Western Cities and Eldorado. (Tr. 1793-94.)

124. Sebastion testified that either Mr. Boulder or Mr. Eldorado, or both, told him that KQKS was not cooperating to alleviate the interference at the Site. Sebastion stated that Mr.

Boulder and Mr. Eldorado told him they felt the problem would be resolved if KQKS would take their antenna off the tower, but KQKS had refused to do so. (Tr. 2866.)

125. Pyle telephoned Cutforth on December 27, 1988, to discuss the interference problem at the Site. (Tr. 1684.) Cutforth and Schipper met with Pyle for over an hour on December 28, 1988, after they returned from the Site. (Tr. 1877, 1884, 1685, 1736.) They explained to Pyle how well their modification had worked, and that they had been required to remove it without conducting any tests. Cutforth stated that their solution to the problem had been declared unacceptable. (Tr. 1884.) Schipper stated that they also discussed the fact the low-level audio returned after the capacitors were removed. (Tr. 1736.)

126. Pyle testified that after Cutforth visited the Site he generally would report to Pyle what he had learned. (Tr. 968.) Schipper assisted Cutforth at the Site, and together they kept Pyle advised of everything that was going on. (Tr. 1206, 1719-20.)

127. When Schipper telephoned Thomas Mullen of Mullen Security on December 28, 1988, to inquire about the problem he was experiencing, Mullen denied having complained to Mr. Boulder about any problems with his communications system. Schipper sent letters to Mullen and Sebastian on December 28 and 29, 1988, respectively, confirming their telephone conversations. (Western Ex. W19, p. 16 and Exs. 3 and 4 thereto.)

128. During November and December 1988, Tillotson spoke with Schipper on a regular basis concerning Schipper's observations as to what problems existed at the Site, as well as his observations of the quality of communications on the two-way channels which allegedly were receiving interference. Schipper confirmed what Cutforth had told Tillotson concerning his observations of the interference problem during his visits to the Site, *i.e.*, that although KQKS audio was detectable on occasion on certain of the frequencies operated by Mr. Boulder, the level of the audio was very low and far below that which would interfere with or degrade communications on the channels. Schipper also informed Tillotson that, although he heard KQKS audio on occasion while monitoring certain frequencies on his scanner, the level of KQKS' signal was always very low and was not even noticeable when there were actual voice communications on the frequencies. (Western Ex. W22, pp. 14-15; Western Ex. W19, p. 17.)

129. Pyle explained that because the case involved engineering matters, he assigned his chief engineer, Schipper, to work directly with Tillotson. While Pyle was kept advised of developments and provided information when it was requested, Tillotson was the "point man"

who worked directly with Schipper and KQKS' engineering consultants, Cutforth and Dawson. (Western Ex. W25, p. 2; Tr. 2590-91.)

130. Tillotson's Contacts with Joslins. Tillotson testified that in addition to discussing the empirical evidence of interference, or the lack thereof, with Cutforth and Schipper, he had at least four telephone conversations with Diane Kaiser, an attorney for Joslins, in an effort to determine the severity of that problem. Tillotson first called Kaiser in October 1988, immediately after he read Sebastian's October 10, 1988, statement that was submitted in connection with the Second Objection. In his statement, Sebastian complained that music from KQKS was heard on the channel used by Joslins' security personnel. Tillotson explained to Kaiser that KQKS would do whatever was necessary to eliminate the problem but, in order to do so, KQKS needed to be notified whenever its signal was detected on the Joslins frequency so that its engineering staff could observe the phenomenon. (Western Ex. W22, p. 15; Tr. 2416; B/E Ex. 5, p. 615.) Kaiser told Tillotson she did not believe the problem was as serious as Sebastian's statement had indicated, and she promised to tell Sebastian he should contact KQKS whenever the problem was observable. Tillotson also asked Kaiser to call him directly if the problems that Sebastian had complained of persisted. Kaiser never called Tillotson about any problems. (Western Ex. W22, p. 15.)

131. On October 24, 1988, a letter from Sebastian, dated October 20, 1988, was filed by Boulder as an attachment to an Emergency Petition for Expeditions Action. In his letter, Sebastian alleged that music on the Joslins frequency had made it impossible for one of their security officers to communicate with other security personnel during the apprehension of a shoplifter. (B/E Ex. 5, pp. 639, 651.) Tillotson again called Kaiser and asked her to have Sebastian notify KQKS whenever problems of the sort he had complained of were observed. Tillotson also repeated his request that she call him if the problems persisted. On this occasion, Kaiser either authorized Tillotson to call Sebastian directly to discuss the problem, or had Sebastian call Tillotson to discuss his complaints. (Western Ex. W22, p. 16.)

132. On October 25, 1988, Tillotson spoke directly with Sebastian. Sebastian described the problem as KQKS music in the background of Joslins' two-way channel. Tillotson testified that Sebastian told him the problem was intermittent, and that, with the exception of the one occasion described in his latest complaint, the music was not so loud as to interfere with communications on the channel. Sebastian strongly believed, however, that KQKS should do whatever was necessary to eliminate all traces of the music. Tillotson informed Sebastian that KQKS was attempting to resolve the problem, and explained that it would greatly facilitate

resolving the problem if he would call Schipper directly whenever the music could be heard. (Western Ex. W22, p. 16.)

133. Sebastian claimed he told Tillotson that Joslins was unable to communicate on their radios. (Tr. 2779.) Tillotson informed Sebastian that KQKS was doing everything it could to resolve the problem, but that they were having problems with Mr. Boulder and Mr. Eldorado. Tillotson also told Sebastian that if the problems persisted, he should contact Schipper immediately so he could locate the problem and attempt to resolve it. (Western Ex. W22, p. 16; Tr. 2815, 2798-99.)

134. Tillotson's last conversation with Kaiser occurred on December 28, 1988, when he called her to find out whether the problems Sebastian had complained of were continuing. (Western Ex. W22, p. 16; B/E Ex. 25, p. 2; Tr. 2370-71.) Kaiser told Tillotson she was not aware that they were, and stated she would check with Sebastian and get back to Tillotson if there was a problem. Kaiser never called Tillotson back. (Western Ex. W22, pp. 16-17.)

135. The FCC's December 27, 1988, Letter. On December 27, 1988, the Commission issued a letter (the "FCC Letter") disposing of the Second Objection and related filings, and granting Western Cities' April 30, 1987, application, as amended July 1, 1988, for a construction permit for the facilities it was operating from the Site pursuant to its STA. (B/E Ex. 1, pp. 1-5.) In issuing the FCC Letter, the Commission noted that it considered 32 pleadings and letters which had been filed in connection with Western Cities' April 30, 1987, application and amendments thereto. Nineteen of those pleadings and letters were filed by Glaser on behalf of Boulder and Eldorado. (*Id.* at 3, n.2; *see also* B/E Ex. 5, pp. 100-216, 233-269, 275-280, 301-658, 677-748.)

136. Regarding the interference complaints included in the Second Objection, the FCC Letter stated:

We also find, however, that KQKS is the source of all the destructive interference to the facilities of the other Commission licensees located on Eldorado Mountain. While not of such a nature or extent to preclude grant of a construction permit, the interference, nonetheless, must be corrected.

(B/E Ex. 1, p. 4.) The Commission further stated:

We find that the above-captioned modification application clearly falls within the scope of the Commission's "newcomer" policy. Accordingly, we hold that Western [Cities] is responsible, financially and otherwise, for correcting all the interference caused to facilities operating at the [S]ite prior to the arrival of KQKS-FM. Western [Cities'] construction permit will be conditioned to require it to correct all outstanding interference problems.

(*Id.*) The Commission granted Western Cities' application "conditioned upon correction of the interference caused to all facilities operating at the [S]ite prior to the arrival of KQKS-FM." (*Id.*) The Commission concluded by reminding Western Cities that an application for license, FCC Form 302, must be filed within 10 days of receipt of the letter, and by stating that the "instrument of authorization" would be forwarded under separate cover. (*Id.* at 5.)

137. The December 27, 1988, Construction Permit. The "instrument of authorization," FM Broadcast Station Construction Permit, File No. BPH-870430IB (FCC Form 351-A), bearing the grant date of December 27, 1988, contained four conditions. The first three conditions related to stations located near Table Mountain. The fourth condition was the special condition mentioned in the FCC Letter and stated:

The grant of this construction permit is conditioned upon KQKS correcting all interference caused to all facilities operating at the [S]ite prior to the arrival of KQKS(FM).

(B/E Ex. 2, pp. 1-8.) Tillotson did not see a copy of the actual construction permit until after Western Cities' January 4, 1989, FCC Form 302 ("License Application") had been filed. (Tr. 2580.)

138. Western Cities' January 4, 1989, License Application. On December 28, 1989, Tillotson prepared and sent to Schipper by Federal Express a draft License Application. Tillotson informed Schipper that he (Tillotson) had "filled in" the answers to Section I of the draft License Application, but that Schipper would have to "complete Section II-B and . . . sign the certification to this section." Tillotson then instructed Schipper to have Pyle sign the certification on the second page of the form and then return the form and a filing fee check to Tillotson for filing before January 6, 1989. (B/E Ex. 9.)

139. On January 4, 1989, Western Cities filed its License Application (FCC Form 302) to cover the facilities described in its construction permit. (B/E Ex. 3.) The engineering portion of the License Application (Section II) was signed by Schipper, as Chief Operator, on January 3, 1989. The following language appeared above his signature: "I certify that I represent the applicant in the capacity indicated below and that I have examined the foregoing statement of technical information and that it is true to the best of my knowledge and belief." (*Id.* at 6.) The License Application, including Section II, was certified by Pyle, as Vice President of Western Cities, on January 3, 1989. The following language appeared above his signature: "I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith." (*Id.* at 4.) Cutforth was not involved in any way in the preparation or filing of the License Application, and had no recollection of either Pyle or Tillotson telling him about the filing of the License Application. (Tr. 1886-87.)

140. In "Section I -- General Data" of the License Application, the following question appeared:

3. Have all the terms, conditions, and obligations set forth in the above described construction permit been fully met?

If No, state exceptions.

Boxes were provided for the applicant to check "Yes" or "No." Western Cities placed an "X" in the "Yes" box. (B/E Ex. 3, p. 3.)

141. In Section II-B, "License Application Engineering Data -- FM Broadcast," the following question appeared:

9. In what respect, if any, does the apparatus constructed differ from that described in the application for construction permit or in the permit? Attach exhibits to show compliance with all conditions on construction permit.

Western Cities answered this question "NONE" and attached no exhibits to the License Application in response thereto. (B/E Ex. 3, p. 5.)

142. Tillotson's View of the FCC Letter. Tillotson received the FCC Letter on the date it was issued. (Tr. 2339.) He was upset at the Commission's "finding" that KQKS was the source of all destructive interference. He believed the Commission had no evidence of actual interference, and thus did not have the kind of information necessary to make such a finding. (Tr. 2280-81.) Tillotson termed the ruling "a piece of garbage," and stated that he "did not find that this was a very stellar performance of the agency." (Tr. 2281-85.)

143. Tillotson testified that the FCC Letter was written by the Mass Media Bureau, which had never been to the Site, had never observed the "phenomena," and had no engineering information as to what was going on at the Site. (Tr. 2401.) In Tillotson's opinion, the FCC Letter could not constitute a finding of any interference because the FCC did not have any objective evidence, or even subjective evidence, to support its finding. (Tr. 2288.) Although he agreed that the language in the FCC Letter was not equivocal, Tillotson did not believe that, from a legal standpoint, the Commission had made a valid finding, but, rather, that it was conclusory. (Tr. 2291, 2294, 2504.) He also noted that the FCC Letter did not inform KQKS specifically to whom it was causing interference. (Tr. 2292.)

144. Tillotson articulated his belief as follows in his December 28, 1988, letter to Astrella, Western Cities' Denver counsel:

In an unfortunate use of language, the FCC states . . . that it finds "that KQKS is the source of all destructive interference to the facilities of the other Commission licensees located on Eldorado Mountain." It is obvious from the entire letter, and from the limited information that the FCC has in its possession concerning the nature and extent of "destructive" interference at the [S]ite, that the FCC did not make a finding that there is destructive interference at the [S]ite. Rather, what if [sic] found is that, in so far as there is destructive interference as described by the various opponents of KQKS' application, KQKS is the source of that interference. The letter also makes it clear that KQKS' responsibility for fixing any interference at its expense is limited to interference being caused to facilities that were "operating at the [S]ite prior to the arrival of KQKS." On this point, a case can be made that KQKS is not responsible for correcting interference caused to facilities which, though existing at the [S]ite prior to KQKS' arrival, were modified in any material way (e.g., changes made in equipment, equipment relocated or rewired) after KQKS arrived.

(B/E Ex. 19, p. 1, emphasis in original.)

145. Western Cities' Reaction to the FCC Letter. Although Tillotson disagreed with the Commission's interference finding, he stated that Western Cities accepted it for purposes of determining how to proceed. (Tr. 2291.) In filing the January 4, 1989, License Application and indicating that the condition in the construction permit had been complied with, Tillotson explained that he knew the Commission had made its finding on material that had been filed in the last three months. Tillotson testified that KQKS personnel had been to the Site in November and December 1988, but had found no evidence of interference to the complainants' facilities. They detected very low, intermittent music in the background of the repeater transmissions. (Tr. 2292.)

146. After receiving the FCC Letter, Tillotson had discussions with Schipper and Cutforth regarding the FCC's finding that KQKS was the source of all the destructive interference, and what steps, if any, Western Cities would need to take to comply with the Commission's directive to cure all interference to facilities located at the Site which preceded KQKS. In these discussions, Cutforth and Schipper reviewed what they had observed on their visits to the Site and in their monitoring of the two-way facilities operating from the Site. Tillotson testified that the three men concluded KQKS was in full compliance with its obligations under the FCC's newcomer policy as well as the interference condition set out in the FCC Letter. (Western Ex. W22, p. 17; Tr. 2347.)

147. Schipper testified that he received a copy of the FCC Letter by telecopy from Tillotson on December 27, 1988, and spoke with Tillotson at approximately the same time. (Western Ex. W19, p. 17; Tr. 1390, 1419.) Schipper understood the FCC Letter to say that the Commission had found that KQKS was the cause of destructive interference at the Site, but Schipper had not observed any interference, and he believed the Commission was wrong in its determination. (Tr. 1578, 1435-36.) Tillotson told Schipper that he interpreted the FCC Letter as saying not that KQKS was causing interference, but only that if KQKS were causing interference, it must cure that interference. (Tr. 1579-80.) Schipper did not believe there was anything wrong with Tillotson's interpretation of the FCC Letter because he had not observed any interference at the Site. (Tr. 1584.) Schipper deferred to Tillotson's judgment with respect to his interpretation of the term "interference," and his interpretation of the FCC Letter. (Tr. 1719, 1587.)

148. Pyle testified that he received the FCC Letter from Tillotson either on December 27 or 28, 1988. He recalled speaking to Schipper and Tillotson concerning the FCC Letter before he signed the License Application. (Tr. 957.) Pyle stated that in his mind the FCC Letter meant that if, in fact, there was any destructive interference, KQKS was the cause of that interference. (Tr. 1047.) Based on the advice he had received from Dawson, Cutforth, Schipper and Tillotson, Pyle was "totally convinced" that there was not any destructive interference at the Site, and he understood Tillotson was going to address the FCC Letter the following day. (Tr. 933, 1047-48, 1129, 1050-51.) Pyle also testified that he thought the language in the FCC Letter stating that KQKS was the source of all destructive interference was "a crock." (Tr. 1052.)

149. Cutforth did not see the FCC Letter prior to January 4, 1989. (Tr. 2036.) Cutforth stated that Pyle read the phrase to him concerning the Commission's interference finding either on the evening of December 27, 1988, or on the morning of December 28 as he was preparing to go to the Site. (Tr. 2038, 2126.) He discussed the Commission's finding with Tillotson over the phone when he talked to him from the Site on December 28, 1988. (Tr. 2042.) In that conversation, Cutforth discussed with Tillotson the level of symptoms on the Site, as well as the phrase from the FCC Letter indicating that KQKS was "the source of all the destructive interference" on the Site. (Tr. 2035-36.) In their December 28 conversation, Cutforth also explained to Tillotson that after removing the capacitors, the conditions at the Site were essentially the same as they were before the capacitors had been installed. (Tr. 1906.)

150. In an effort to make certain Western Cities had not overlooked anything, Tillotson attempted to learn from the FCC's Mass Media Bureau the specific facilities operating at the Site that the FCC had determined were receiving destructive interference, and the nature of the interference. The FCC staff refused to furnish Tillotson with any of such information on the grounds that to do so would constitute an *ex parte* communication. (Western Ex. W22, p. 17.)

151. Tillotson as the Focal Point. Tillotson was responsible for making the determination that Western Cities could certify in its January 4, 1989, License Application that it had complied with the condition in its construction permit. He was the "focal point" in working with the engineers and then applying the information he had received to his understanding of the FCC's definition of interference and the newcomer policy. (Tr. 2590-91.) In advising Western Cities concerning the extent of its obligation to correct the problem of KQKS' signal being audible on certain two-way channels, and whether KQKS had complied with the condition stated in the FCC Letter that it cure all interference to pre-existing facilities at the Site, Tillotson relied on Dawson's explanations concerning the circumstances under which an undesired signal, or noise,

constituted interference. He also relied on his own interpretation of the definitions of "interference" and "harmful interference" as set out in Section 2.1 of the Commission's Rules, which was influenced by Dawson's explanations of these technical concepts. (Western Ex. W22, pp. 11-12.) Tillotson discussed his understanding of the term "interference" with Cutforth, and Cutforth agreed completely with Tillotson's understanding of the term. (Tr. 2464.)

152. The Bases for Tillotson's Position. In providing his legal opinion of the phenomena that had been described to him, Tillotson explained that he relied to a great extent on the information Schipper had provided him, but he also relied on a "tremendous body" of other information. (Tr. 2275.) Tillotson relied on what he had read in the voluminous complaints which had been filed against KQKS, his conversations with Cutforth regarding the Site, and this two years of experience in talking with Mr. Eldorado. (Tr. 2275-77.) Tillotson stated that they had been dealing with Mr. Eldorado and Mr. Boulder since January 1987. In his view, Mr. Boulder did not complain of any problem at the Site until August 1988, and Mr. Boulder's problems began to arise only after Mr. Eldorado, who was represented by the same attorney, filed a lawsuit against Western Cities. Mr. Boulder also failed to show up on two occasions when he had previously agreed to meet Schipper at the Site to discuss the problems he was having. (Tr. 2402-03, 2275-77.) These facts led Tillotson to believe that Mr. Boulder was "not a man that's got an interference problem." (Tr. 2403.)

153. It was Tillotson's view that Mr. Eldorado wanted to evict Western Cities from the Site, in part, because he was negotiating with other people who were going to give him a better deal, *i.e.*, by building the MSA facility, which would have accommodated four tenant stations. (Tr. 2573; Western Ex. W22, p. 3.) Tillotson testified that Western Cities wanted to stay on the Site, and wanted to get damages for all the aggravation it had suffered. When Tillotson spoke to the Commission in October 1988, he indicated there was no way these people were going to agree because it was in Mr. Eldorado's interest to pursue his lawsuit and get Western Cities evicted from the Site by claiming that KQKS was causing interference. Tillotson believed that regardless of the actual situation, Mr. Eldorado was going to tell the Commission that KQKS was causing interference. (Tr. 2573.)

154. Tillotson telephoned Joslins' lawyer, Kaiser, after receiving the FCC Letter to confirm directly that music on the Joslins' channel was not at a level that was interfering with communications on the channel Mr. Eldorado and Mr. Boulder had identified as most affected by KQKS. (Western Ex. W22, pp. 17-18.) Kaiser told Tillotson she was not aware of a

continuing problem and said she would check with Sebastian and let Tillotson know if there was a problem. She never called Tillotson back. (*Id.* at 16-18.)

155. Tillotson also considered the fact that virtually all of the documents and complaints that were filed with the Commission complained of phenomena that developed in 1988, which was eight months after KQKS had made its last, and relatively minor, technical change at the Site. (Tr. 2277.) Tillotson considered all of these facts in the context of Cutforth going to the Site and observing the complaints. (Tr. 2403.) Cutforth told Tillotson he saw no evidence of desense. He explained what he had done at the Site, and that what Mr. Boulder and Mr. Eldorado were describing was not desense. Cutforth indicated to Tillotson that something else was going on, but it had nothing to do with desense. (Tr. 2463.)

156. Tillotson testified that they then began to focus on the level of music, how loud it was, and whether it degraded the ability to communicate on the channel in any way. Tillotson explained that he used the information which he obtained from the engineers and then applied his understanding of the Commission's definition of interference. (Tr. 2463.)

157. Tillotson stated that Schipper was his primary "eyes and ears." Over the course of working with Schipper for 18 months, Tillotson had come to have a great deal of confidence in Schipper as a candid, reliable source of information. Tillotson testified that Schipper never hid from him the fact he could occasionally hear music in the background. (Tr. 2391.) Tillotson never saw anything that would cause him to doubt or question the judgment of either Cutforth or Schipper. (Tr. 2402.)

158. Based on his discussions with Cutforth, Dawson, and others, Tillotson believed it was almost impossible to eliminate all background noise, whether it was music, static, or something else. In his mind, this was virtually impossible, particularly at multi-user sites as complex as Eldorado Mountain. Tillotson stated that the question then became whether the background music degraded the use of the channel. (Tr. 2465.)

159. Also important to Tillotson was the distinction between RF radiation that interfered with the RF components of a communications device (*e.g.*, repeater), and RF radiation that affected the non-RF circuitry. During his discussion with Dawson in the fall of 1988, Dawson told Tillotson that, to the extent the problem manifested itself purely as RF in the audio (non-RF) components of a repeater, then, in his opinion as an engineer, that would not constitute interference for which KQKS would be responsible. (Tr. 2619.) Tillotson stated that he also

discussed this concept with Cutforth prior to January 3, 1989, with respect to his observations at the Site. Cutforth described the music as being primarily in the audio as opposed to the RF circuitry of Boulder's repeaters. (Tr. 2621.) In response to a question whether he would consider it interference if RF was entering parts of the repeater other than through the RF connecting wires or RF sections of the radio, Cutforth explained that only a user reporting the problem would refer to it as interference. He would not interpret this type of problem to be "interference." (Tr. 1921, 1923.)

160. Tillotson did not base his decision that Western Cities was not causing interference on the distinction of whether its RF was affecting the non-RF circuitry of Boulder's equipment, rather than the RF components. In Tillotson's view, regardless of how KQKS' RF manifested itself, if it degraded voice communications, it was interference. (Tr. 1921, 1923.) For purposes of advising Western Cities, Tillotson assumed that whatever the phenomena, whether it effected the audio or the RF components, it would be interference. (Tr. 2620.)

161. In addition, Tillotson was uncertain whether Boulder's repeaters were newcomers to the Site because, although he had attempted to get this information in various ways, it was not clear when their facility commenced operation from the Site. (Tr. 2591.) Tillotson always understood that before there was ever a problem at the Site, Boulder had relocated and modified its facilities. Tillotson believed that this created a question of whether they were a newcomer. (Tr. 2591-92.) For purposes of answering Section I, Item 3, in the License Application, Tillotson assumed that Boulder's equipment was at the Site before KQKS because he had no case authority to support his position that the relocation of their equipment changed their status under the newcomer policy. Accordingly, Western Cities took the position that they were responsible for resolving any interference that KQKS might be causing Boulder. (Tr. 2592.)

162. Tillotson stated that he never spoke to Cutforth and Schipper about whether the KQKS signal was degrading the use of Motorola's facilities. Although Tillotson understood the problem with Motorola to be greater than that with the Boulder repeater which Joslins was using, Western Cities believed they were not responsible for any interference to Motorola under the newcomer policy. (Tr. 2292-93, 2406-07, 2579.) Tillotson also stated that Motorola would not let Cutforth and Schipper go near their equipment. (Tr. 2579.)

163. In summarizing his decision, Tillotson testified that after they began investigating the Site, they found no FCC-defined interference to cure, and Mr. Boulder and Mr. Eldorado would not let them cure the other problems they were experiencing at the Site. Tillotson did not

believe the FCC Letter directed Western Cities to correct the "phenomena," as opposed to "interference," because the Commission had a rule that defined interference and the FCC Letter specifically referenced the newcomer policy. Tillotson indicated that this was consistent with his discussion with Dawson regarding the fact that it was impossible to eliminate all background noise. On the other hand, Tillotson stated that if they had observed the music to be so loud that people could not communicate on the radios, then he clearly understood that Western Cities was responsible for resolving that problem. However, there was no evidence to indicate that the phenomena rose to that level. Therefore, Tillotson stated it never entered his mind that the Commission could expect Western Cities to eliminate every trace of music. Tillotson also believed the Commission was viewing the problem as being as severe universally as Sebastian had described in the isolated instance where his agents could not communicate on Joslins' two-way radio. (Tr. 2578-79.)

164. In putting all of this information together, Tillotson concluded that there was no evidence of interference at the Site on December 27, 1988, or on January 4, 1989. (Western Ex. W22, p. 18; Tr. 2403.) He reached this conclusion even though the phenomena existed on January 4, 1989, to the same extent it existed on December 27, 1988. (Tr. 2467.) Tillotson believed this conclusion was "borne out" by the subsequent on/off tests with respect to whether there was any desense,⁷ and by the fact that during the more than two years following trial of the Colorado lawsuit, Western Cities did not hear a "word or a peep" of any further problem at the Site. (Tr. 2403-04.)

165. Schipper's Role in Answering Section I, Item 3. On December 28, 1988, Tillotson sent Schipper by Federal Express an unexecuted, partially completed draft of the License Application. (Western Ex. W19, p. 18; Tr. 1555, 1559.) Schipper received the draft from Tillotson on December 29, 1988. (Tr. 1589.) Section I of the draft License Application had been completed by Tillotson. (Western Ex. W19, p. 18; Tr. 1555-56, 1559-60.) Schipper had conversations with Tillotson after December 29, 1988, and prior to January 3, 1989, regarding the phenomena at the Site. During those conversations, Schipper informed Tillotson that he was continuing to monitor his scanner, there was no evidence of any reduced range that he could detect, and any KQKS audio he observed was at an extremely low level. (Tr. 1738.)

166. Schipper completed the engineering portion of the License Application (Section II) and certified that portion on January 3, 1989. (Western Ex. W19, p. 18; Tr. 1413.) Schipper

⁷ See paragraph 184, *infra*.

testified that Tillotson advised him by telephone sometime between December 29, 1988, and January 3, 1989, that, based on their conversations and Tillotson's discussions with Cutforth and Dawson, KQKS could represent in its License Application that it had complied with the condition in the construction permit. (Western Ex. W19, p. 18; Tr. 1738.) Schipper stated that he deferred to Tillotson's judgment with respect to Section I, Item 3, of the License Application. (Tr. 1563-64.)

167. Schipper gave the completed License Application to Pyle for his review and advised him that Western Cities was in compliance with the condition. Schipper testified that his conversation with Pyle took place in Pyle's office and lasted no more than five minutes. Pyle reviewed the License Application and then signed it in Schipper's presence. (Western Ex. W19, p. 18; Tr. 1415, 1686.)

168. Pyle's Decision to Execute the License Application. Pyle stated that at the time he executed Western Cities' License Application on January 3, 1989, he had seen the FCC Letter stating that Western Cities was responsible for all destructive interference to pre-existing facilities at the Site. (Western Ex. W18, p. 1.) Based on the input Pyle received from Tillotson, Schipper, Dawson, and Cutforth, he believed KQKS was not causing any "interference" as that term was defined in the FCC's rules. Pyle also stated that Tillotson had advised him, through Schipper, that Western Cities was in compliance with the condition in the construction permit relating to interference. (*Id.* at 1-2.) Although he was aware that Joslins was continuing to complain about interference, Pyle believed the audio they were hearing did not interfere with their two-way communications. (Tr. 1207, 1211.)

169. Pyle explained that the music heard on the two-way radios was not like music in a doctor's office or in an elevator because it never rose to that level. He stated that most of the time there was no music at all and, when it was present, it was at a much lower level and barely audible. (Tr. 1094-95.) He further testified that at no time either before or after January 3, 1989, did Schipper, Cutforth, Dawson, or Tillotson ever advise him that the KQKS audio on the two-way repeaters operating from the Site was at a level which would render the communications unintelligible, or that KQKS' operation was decreasing the range of any of the facilities on the Site. (Tr. 1259-60.) He further testified:

Why would I do anything to mislead or misrepresent what I would put in [the License Application] when I had those two vultures [referring to Mr. Boulder and Mr. Eldorado] sitting on my shoulder up on that hill at all times?

(Tr. 1129-30.)

170. Western Cities' Petition for Partial Reconsideration and Clarification. On December 29, 1988, six days *before* Western Cities filed its License Application, Tillotson filed a Petition for Partial Reconsideration and Clarification of the rulings made in the FCC Letter. (B/E Ex. 6, pp. 1-8.) In that Petition, Tillotson stated that Western Cities was not aware of any evidence submitted to the FCC that would support a finding that KQKS was the source of any destructive interference to any other facilities at the Site. (*Id.* at 1.) The December 29 pleading pointed out that the interference complaints filed by Boulder and Eldorado did not identify the specific facilities allegedly receiving interference either by call letter or frequency, and none of the complaints were sufficiently documented to permit a determination to be made that destructive interference actually existed, or that KQKS was the source of any such interference. (*Id.* at 2.) Western Cities further stated that there was an insufficient basis upon which the Commission could make a finding that destructive interference in fact existed at the Site, or that, if it did exist, KQKS was the source of the interference. (*Id.* at 3.)

171. Based upon the text of the entire paragraph in which the finding that KQKS was the source of destructive interference appeared, and the paragraph immediately following, Western Cities stated in its Petition that it did not believe the Commission intended the FCC Letter to constitute a determination by the agency that a problem of destructive interference did, in fact, exist at the Site, and that KQKS was the source of such interference. Instead, Western Cities interpreted this portion of the Letter to mean that, to the extent there was destructive interference at the Site which arose after KQKS began operating from the Site, KQKS was presumed to be the source of that interference. (B/E Ex. 6, pp. 3-4.)

172. Western Cities requested the Commission to issue a clarification of the FCC Letter so that it would not be misinterpreted as a final adjudicatory finding by the Commission, based on substantial and credible evidence, that there was a problem of destructive interference at the Site and that KQKS was the source of such interference. Western Cities explained that such a clarification was necessary because the question of whether KQKS was causing interference to other users at the Site was being litigated in Jefferson County, Colorado, between Western Cities and Eldorado. Western Cities anticipated that Eldorado would attempt to use the FCC Letter in the civil proceeding as a final and conclusive FCC determination that KQKS was indeed causing destructive interference. (B/E Ex. 6, p. 4.)

173. In the event the Commission intended the sentence in the FCC Letter stating that it found KQKS to be the source of destructive interference at the Site to constitute a formal agency "finding," Western Cities requested the Commission to state with specificity the evidentiary bases for its finding. Western Cities explained that the requested information was necessary in order for it to quickly and fully discharge its responsibility for correcting the interference which existed at the Site. Western Cities also noted that such information was necessary for the full Commission and, if necessary, a reviewing court to determine whether the finding regarding interference had a sufficient and rational basis. (B/E Ex. 6, pp. 5-6.)

174. Western Cities also requested clarification of the Commission's newcomer policy cited in the FCC Letter. Specifically, Western Cities questioned whether Boulder would be considered a newcomer because its facilities were relocated from one room in the transmitter building to another six months or more after KQKS began operating from the Site. Western Cities also stated that equipment changes and modifications had been made to Boulder's relocated equipment. In light of these facts, Western Cities indicated its belief that Boulder should be considered a newcomer with respect to any equipment relocated, modified, or replaced subsequent to KQKS' arrival at the Site, unless there was credible evidence that the interference problems currently alleged to exist, existed prior to the relocation, modification or replacement of the equipment. (B/E Ex. 6, pp. 6-7.)

175. The Colorado Court Proceedings. As of December 27, 1988, the lawsuit between Eldorado and Western Cities was still pending in Jefferson County, Colorado. (Tr. 2320.) In the Colorado litigation, Western Cities took the position that the question of whether KQKS was causing interference at the Site was for the FCC to decide, and not the state court. (B/E Ex. 8, p. 2; Tr. 2322, 2479.)

176. Tillotson testified that the interference finding in the FCC Letter and its potential effect upon the Colorado litigation was separate from, and had no effect on Western Cities' representation to the Commission that it had complied with the condition in the construction permit. (Tr. 2335, 2584-85.) Tillotson explained that the mere filing of a License Application indicating that Western Cities was in compliance with the condition in the construction permit would not make the Colorado problem disappear. The question of preemption was not part of Tillotson's state of mind in filing the License Application because they were "different issues." (Tr. 2516.) Tillotson explained the relationship between the FCC Letter and the Colorado litigation by stating that with respect to Western Cities' position before the Commission, Western Cities could work around the FCC Letter by demonstrating that it had satisfied the condition in

the permit. (Tr. 2514-15.) Nevertheless, one reason for Tillotson's filing the December 29, 1988, Petition for Partial Reconsideration and Clarification was to prevent the Commission's finding in the FCC Letter from becoming *res judicata* in the Colorado proceeding. (Tr. 2516-17.)

177. The Bank of California Loan. The Bank of California (the "Bank") loaned Western Cities the funds with which to purchase KQKS in 1986. (Tr. 2297.) The loan was closed "on the fact that [Western Cities] did have [the construction permit for Lee Hill] and that that was a final order." (Tr. 2318-19.) After the move to the Site, the Bank became worried because KQKS had no construction permit to operate from that location. (Tr. 2319.)

178. James Clarke was the liaison between Western Cities and the Bank. (Tr. 2299.) Clarke, a Chicago attorney who was an officer of Western Cities, had been one of Western Cities corporate counsel for 20 years. (Tr. 2298.) Clarke requested Tillotson on two or three occasions over the course of 18 months to update the status of the construction permit application for the Bank. (Tr. 2308.)

179. Between September and December 1988, the Bank was putting pressure on Western Cities to get its construction permit application granted. (Tr. 1534.) The Bank had let it be known that it would have been a lot more comfortable if the station was operating under permanent authority. The Bank was also concerned with the "general picture" on the Site. (Tr. 1012-13.) It was Tillotson's general understanding, without having looked at the loan documents, that the Bank's discomfort with Western Cities' failure to obtain a construction permit could have given the Bank a basis for calling in the loan. (Tr. 2319-20.) Therefore, Western Cities informally sought to obtain Commission action on its construction permit application before the end of 1988. (Tr. 2303-04.)

180. However, Tillotson did not feel that appeasing the Bank was worth jeopardizing Western Cities' license by lying to the Commission about whether Western Cities had met the conditions included in the construction permit. (Tr. 2519-20.) In Pyle and Tillotson's views, any concerns relating to the bank loan were wholly separate from questions as to whether Western Cities had met the conditions included in the construction permit, and had no effect on its answer to Section I, Item 3, of the License Application. (Tr. 1258-59, 2584.) According to Tillotson, had Western Cities been unable to certify compliance with the condition to cure the interference, it would have sought an extension of time to file its License Application and a continuance of the STA in order to pursue their remedies or analyze the situation. (Tr. 2519.)

181. The Motorola Inspection. On January 20, 1989, Cutforth and Schipper visited the Site to inspect Motorola's equipment. This equipment was located in a different room of the communications building on the second floor. The Motorola technician demonstrated music playing in the background on one of their systems and stated that it appeared to be about 40 dB down below the standard communications level. Cutforth stated that when the cabinet lids were removed and replaced, the music level changed noticeably. He observed that the front and back covers were vinyl covered metal panels that had no electrical connection to the cabinet. The interior of the repeaters showed the usual well-shielded transmitter and receiver chassis with an open interface chassis interconnected with unshielded wiring. The Motorola representative was adamant that no modification to their equipment would be allowed, not even electrically attaching the covers to the chassis. Cutforth noticed that several of the Motorola antenna coax cables were recently installed and were not grounded to the building shielding. Cutforth and Schipper were unable to attach the cables to the building shielding because no agreement could be reached on a method of attaching the coax to the building shield that was acceptable to all parties. (Western Ex. W20, pp. 8-9.)

182. The Petition to Deny. On January 30, 1989, Glaser, on behalf of Boulder and Eldorado, filed a Petition to Deny Western Cities' January 4, 1989, License Application, alleging, *inter alia*, that Western Cities had not cured the interference problem at the Site, and had falsely certified in its License Application that it had fully met the condition in its construction permit that it cure all destructive interference. (B/E Ex. 6, pp. 159-314.) On February 9, 1989, Western Cities filed a Motion to Strike directed to the Boulder-Eldorado Petition to Deny. (B/E Ex. 6, pp. 347-64.) In the Motion to Strike, Western Cities stated:

The petition should be stricken as sham and false . . . for several reasons.

First, and foremost, it is clear from the summary of the documents submitted in support of the Petition . . . that there is no basis whatsoever for the strident, intemperate and defamatory allegations concerning [Western Cities'] veracity which pervade the Petition. . . . While zealous advocacy is to be encouraged, there is a profound difference between legitimate advocacy and vitriolic attacks on the motives and integrity of opposing parties and their counsel. Such attacks do not serve to elucidate issues and differences between the positions of opposing parties. . . .

Second, . . . the central factual allegation on which the Petition is based — that KQKS is causing interference to facilities that operated from the [S]ite in question prior to KQKS' arrival at the [S]ite — is not substantiated by the exhibits submitted with the Petition, and cannot be substantiated, because the facilities allegedly receiving interference underwent substantial modifications many months after KQKS' arrival at the [S]ite. As discussed above, the affidavit of Petitioners' consulting engineer and the declarations under penalty of perjury of the principals of the Petitioners do not even allege that KQKS is causing interference to such facilities, let alone substantiate such an allegation with specifics.

(*Id.* at 352-53, emphasis in original.)

183. Boulder and Eldorado filed an Opposition to Western Cities' Motion to Strike on February 23, 1989. (B/E Ex. 6, pp. 369-473.) Western Cities filed a Reply on March 6, 1989 (*id.* at 494-503), in which it stated:

The [FCC Letter] contains no finding that KQKS is causing interference to facilities which were operating at the Eldorado [S]ite prior to KQKS' arrival. In fact, the Commission could not have made such a finding since specific information concerning when the various facilities that were allegedly experiencing interference from KQKS were installed at the [S]ite and/or began operating at the [S]ite has never been provided to the Commission.

(*Id.* at 496-97.)

184. Another Visit to the Site. On February 12, 1989, Schipper, Cutforth, Mr. Eldorado, Ellis (Mr. Eldorado's consulting engineer), and Mr. Boulder visited the Site. Measurements were made to determine the sensitivity of Boulder's repeaters to front-end overload from a signal at 104.3 MHz. With the KQKS transmitter off the air, a signal at 104.3 MHz was fed into the antenna inputs of two representative repeaters. The test signal in both cases was in excess of 40 mV, compared to the actual RF of 10 mV measured on November 17, 1988, at the output of the combining equipment feeding Boulder's repeaters. Schipper and Cutforth did not observe any audible change in receiver noise or sensitivity, which indicated that the actual KQKS level was well below that required to desense the repeaters. The tests conducted on Boulder's equipment confirmed Cutforth's and Schipper's opinion that receiver front-end desense was not occurring. Schipper stated that any problems attributable to KQKS would have been caused by KQKS'

signal penetrating the chassis or cabinet of the repeaters, and acting upon the audio, control, or other non-RF circuitry. Because KQKS RF levels varied somewhat throughout the building, moving any equipment or wiring, or adding any equipment or wiring would effect those levels at any given location. Only three of Boulder's repeaters apparently had a problem with KQKS audio. (Western Ex. W19, pp. 18-19.)

185. The FCC's Letters of Inquiry. On March 3, 1989, the FCC sent a letter to Boulder and Eldorado regarding their January 30 Petition to Deny Western Cities' License Application. (B/E Ex. 6, pp. 491-93.) Therein, the Commission requested Boulder and Eldorado to provide specific information with respect to each facility presently experiencing interference which was in operation on or before January 26, 1987, the date KQKS commenced operations from the Site, and a "detailed description of the interference problem." (*Id.* at 492.)

186. On March 7, 1989, Boulder and Eldorado responded to the Commission's March 3 letter by submitting the particular frequencies and call signs of those facilities experiencing interference problems, and information concerning when the users of those facilities began operating. (B/E Ex. 6, pp. 504-22.)

187. In a letter to the FCC on March 21, 1989, supported by declarations under penalty of perjury by Cutforth and Schipper, Tillotson argued that Boulder and Eldorado's March 7, 1989, response did not include a detailed description of the interference problems, nor did it include any engineering data to support the allegations in the January 30 Petition to Deny, and the claims of interference were either untrue, exaggerated or concerned facilities that were not Western Cities' responsibility. (B/E Ex. 6, pp. 526-57.)

188. On April 6, 1989, the FCC sent a letter to Western Cities, Boulder, and Eldorado referencing its March 3 letter and Boulder and Eldorado's March 7 response thereto. (B/E Ex. 4, pp. 1-5.) The letter noted that Boulder and Eldorado's complaints consisted of those involving KQKS music on their repeaters, and those involving a reduction in the range of their communications. With respect to the complaints regarding a decrease in range, the Commission directed Boulder and Eldorado to provide the FCC and KQKS, within 10 days, up to three locations per complaint where communications were previously possible, but were no longer, due to interference caused by KQKS. The FCC also ordered KQKS to reduce power to 540 watts, and granted KQKS a period of 30 days to resolve the interference complaints. The Commission noted that the 30-day period would begin to run when KQKS received access to Boulder and Eldorado's facilities, but would be tolled if access was withdrawn prior to the expiration of the

30 days. (*Id.* at 3.) For purposes of resolving the interference complaints, the Commission defined "access" in the following manner:

[P]hysical access to equipment and facilities at the Eldorado Mountain site and the presence of a person authorized by Petitioners to permit KQKS to make any necessary modifications thereto, as well as physical access to and authorized personnel at all other sites where interference is alleged to be occurring.

(*Id.* at 3-4.) The Commission also stated that it would not countenance dilatory action, and ordered KQKS to operate at reduced power until all the interference complaints had been resolved. (*Id.* at 4-5.)

189. On April 12, 1989, the FCC issued another letter stating that Boulder and Eldorado's refusal to permit KQKS engineering personnel to apply metallic tape to their equipment constituted a denial of "access" as defined in the Commission's letter of April 6 and was unreasonable. Accordingly, the Commission tolled the 48-hour test period and permitted KQKS to operate at full power until it was granted access and permitted to apply metallic tape or other shielding material to and around Boulder's equipment. (Western Ex. W23, p. 23.)

190. On April 24, 1989, the FCC sent a letter to Western Cities which served as written confirmation of the Commission's verbal approval to permit KQKS to return to full power effective April 21, 1989. The Commission explained it had taken this action because Boulder and Eldorado's delays in providing necessary information and the unavailability of Mr. Boulder had prolonged the resolution of the problem. The Commission granted KQKS authority to return to full power and remain operating at that level until May 5, 1989, unless it was demonstrated that KQKS was not diligently pursuing a resolution to the problem. The Commission also noted that there appeared to be several potential solutions to the interference problem, including increasing the antenna height of KQKS, installing capacitors in the land mobile transmitters, shielding KQKS' transmission cable, and relocating KQKS' antenna to a new nearby tower. (Western Ex. W23, p. 25.)

191. The May 9 Amendment. On May 9, 1989, KQKS filed an amendment to its January 4, 1989, License Application. The purpose of the amendment was to reflect the following modification: "Antenna bays are half-wave spaced. Transmission line was changed to allow for increased transmitter output power, due to lower antenna gain. Operating constants also changed to reflect this change." (B/E Ex. 7.) At the time Western Cities filed its May 9

amendment, Tillotson stated he was "absolutely confident" there was no interference at the Site for which KQKS was responsible because more information had been gathered and more tests had been conducted. Tillotson further stated: "My confidence in the original answer [to Section I, Item 3, of the License Application] had been reaffirmed to a moral certainty." (Tr. 2430.) Pyle stated that Mr. Eldorado was in favor of, and in fact supported, Western Cities' May 9, 1989, amendment. (Tr. 1035-36.)

Issue (d) -- Real Party In Interest Issue

192. **Background.** In 1970, Richard C. Phalen ("Rick") and three other people founded Western Cities Broadcasting, Inc. ("Western-I"). Rick was the chief executive officer of Western-I, and eventually owned 21.3 percent of the company. Between 1970 and 1985, Western-I acquired eight AM and FM stations in the following markets: Las Vegas, Nevada; Tucson, Arizona; Phoenix, Arizona; Sacramento, California; and San Jose/Gilroy, California. (L/B Ex. 22, pp. 6-9.)

193. On March 15, 1985, the assets of Western-I were sold to Nationwide Communications. (Tr. 3573.) Rick ultimately received \$7 million in proceeds from the sale. (Tr. 3437, 3502, 3552.) Upon the sale of Western-I, Tillotson, who had provided legal advice to Western-I and Rick since 1972, began advising Rick of other broadcast opportunities. (L/B Ex. 22, p. 10; Tr. 3574.) Tillotson believed Rick was looking to acquire broadcast properties primarily in major markets in the west. (Tr. 3574-76.)

194. Rick is the father of Shawn Phalen ("Shawn"). (L/B Ex. 2, p. 1.) Shawn was born February 8, 1966. (L/B Ex. 15, p. 1.) In the spring of 1985, Shawn was a full-time student at the University of Arizona. (L/B Ex. 1, p. 1.)

195. **Pre-Filing Activities.** In the spring of 1985, Tillotson telephoned Shawn in Tucson to inquire whether she would be interested in filing a construction permit application for a new FM station at Montecito, California. (L/B Ex. 21, pp. 31-32.) Tillotson brought the Montecito opportunity to Shawn's attention because he believed her gender and residence in Montecito would enhance her chances of winning a comparative proceeding. He also believed that if Shawn could obtain a loan from her parents, she would have no trouble financing the prosecution of an application. Tillotson was aware that Shawn was majoring in broadcast communications at school and was interested in a career in communications. (Tr. 3576, 3737-40.)

196. Tillotson had never before called Shawn about a broadcast opportunity. (L/B Ex. 21, p. 31.) Tillotson had first met Shawn in 1982 when he and his family ate dinner with the Phalen family. (L/B Ex. 21, p. 41.) He became further acquainted with Shawn during occasional visits with the Phalen family. (Tr. 3738.)

197. Following Tillotson's call, Shawn called her parents, Rick and Tina Phalen. They discussed the pros and cons of proceeding. Rick then discussed the matter with Tillotson. Based on the discussion, the Phalens decided it would be a great idea for Shawn to file an application for Montecito and that Rick and Tina would fund Shawn's application. (L/B Ex. 1, pp. 2-3; L/B Ex. 22, p. 11; L/B Ex. 25, p. 50.) Rick and Tillotson did not discuss the possibility of Rick's filing an application for Montecito. (L/B Ex. 25, p. 51; Tr. 3743.)

198. Upon learning from the Phalens that Shawn would be interested in filing a Montecito application, Tillotson recommended that Shawn retain Dawson as her engineer. Dawson had previously worked for Rick in March 1985, when Rick had consulted Dawson with respect to a station Rick was investigating for possible purchase. Shawn thereupon called Dawson, whose initial task was to identify a suitable transmitter site for the proposed Montecito station. Dawson advised that an ideal site would be the one used by Station KTYD, Santa Barbara. Shawn then called an owner of the station, Robert Liggett, who was an acquaintance of her father, to discuss the use of the site. (L/B Ex. 1, p. 3; L/B Ex. 2, p. 8; L/B Ex. 25, p. 86; Tr. 3329.)

199. On April 27, 1985, Shawn was seriously injured in an automobile accident. She was hospitalized in Tucson for a week to 10 days. Thereafter, her parents had her flown to Montecito, where she continued her recuperation. (Tr. 3441.) During May 1985, Shawn experienced both physical and mental difficulties because of the severity of her injuries and the strength of her pain medication. (L/B Ex. 22, p. 14; L/B Ex. 25, p. 53; Tr. 3380-82, 3443-45.) Consequently, although Tillotson had advised Rick that Shawn had to do the substantive work of the application, Rick became involved in securing a transmitter site for Shawn's application. (Tr. 3440, 3445.)

200. On May 8, 1985, Rick and Tillotson had a telephone discussion concerning the location of Shawn's proposed transmitter site. (L/B Ex. 25, p. 86.) On May 16, 1985, Rick had a further discussion with Tillotson. Subsequently, Tillotson telephoned Dawson and inquired about the possibility of obtaining an exclusive option for the transmitter site. (L/B Ex. 24, pp. 51-52.)

201. On May 22, 1985, Rick telephoned James Stucko, an attorney with the Chicago law firm of Pedersen and Houpt, and asked Stucko to prepare a lease agreement for Shawn's proposed transmitter site. Rick had used Pedersen and Houpt for general legal work since 1969, and Peer Pedersen, one of the named partners, had been one of Rick's business partners in Western-I. (L/B Ex. 22, pp. 12-14.) By letter dated May 22, 1985, Stucko sent Shawn a draft lease agreement. (L/B Ex. 5.)

202. By June, Shawn was well enough to resume work on her application. Thus, on June 3, 1985, Shawn had a telephone conversation with Stucko in which she suggested two changes in the lease agreement. (L/B Ex. 6.) On June 10, 1985, Stucko had a telephone conversation with both Rick and Shawn about further revisions to the proposed lease agreement. (L/B Ex. 24, p. 52.)

203. Notwithstanding Stucko's work, Shawn did not execute a lease. Rather, by letter dated July 24, 1985, Shawn obtained for \$250 a promise from the owner of the KTYD site that the site would be made available for her proposed station. (L/B Ex. 28.)

204. On May 15, 1985, an account for Shawn Phalen was opened at the Santa Barbara Bank and Trust. (L/B Ex. 15.) Rick and Tina Phalen supplied the funds for the account. (L/B Ex. 3, p. 2; L/B Exs. 17 and 18.) The Shawn Phalen account was used to pay expenses incurred in connection with the preparation and prosecution of Shawn's Montecito application. (L/B Ex. 3, p. 2; L/B Ex. 21, pp. 38-39.)

205. Included among those expenses were Tillotson's and Dawson's bills, which were sent to Shawn in care of Rick at Rick's Montecito post office box. (L/B Ex. 20, pp. 16-17; L/B Ex. 24, *passim*.) Checks for the Tillotson and Dawson bills were made either by Tina Phalen (who signed Shawn's name) or Shawn, depending on whether or not Shawn was in Montecito. (L/B Ex. 3, p. 2; L/B Ex. 19; L/B Ex. 20, pp. 39-44, 58-60; L/B Ex. 25, pp. 78-79.) Rick reviewed Tillotson's bills before they were paid and, in at least one instance, Rick and Tillotson agreed to reduce Tillotson's bill. (Tr. 3474-75; L/B Ex. 44.) The fees for services provided by Stucko and the Pedersen firm, which also included review of settlement agreements prepared after Shawn's application was filed, were charged against a credit owed by Pedersen and Houpt to Rick. (L/B Ex. 22, pp. 10-16; L/B Ex. 24, pp. 52-53; Tr. 3394, 3517-18.)

206. In August and September 1985, Tillotson had brief telephone conversations with Rick and Shawn, respectively, about the proposed Montecito application. With Rick, Tillotson

discussed the impact of a court decision which eliminated the preference given to females in FCC comparative broadcast licensing proceedings. (L/B Ex. 24, p. 2; L/B Ex. 25, p. 57.)

207. On November 15, 1985, the FCC issued a Public Notice advising that applications for a new FM station at Montecito would be accepted between December 2, 1985, and January 2, 1986. (Tr. 3917-18.) By letters dated November 19 and 20, 1985, Dawson and Tillotson, respectively, advised Shawn of the Montecito filing window and recommended that a number of steps be taken to ensure that her application would be prepared in a proper and timely manner. In this regard, Tillotson explained, *inter alia*, what Shawn would need to do in order to certify her financial qualifications. In a subsequent telephone conversation, Dawson told Shawn that it would cost approximately \$125,000 to construct her proposed station. Dawson and Tillotson sent copies of their November 19 and 20, 1985, letters to Rick. (L/B Ex. 1, pp. 4, 14-16; L/B Ex. 7; L/B Ex. 24, p. 2.)

208. On November 29, 1985, when Shawn was home from school, the Phalen family (Rick, Tina, Shawn, and Shawn's sister, Kathleen) discussed the financing of Shawn's proposed application. To ascertain how much money Shawn would need to prosecute her application, build her station, and operate it until the station was likely to become profitable, Rick and Shawn prepared a three year "*pro forma*" budget for the station. Rick and Shawn determined that she would need \$1.5 million to build and operate the station, plus another \$100,000 to prosecute her application. (L/B Ex. 1, p. 5; L/B Ex. 2, pp. 2-4.) In this regard, Rick had already discussed with Tillotson what his firm's fees would be for prosecuting Shawn's application. (Tr. 3327.) Rick and Shawn reduced the budget to writing, but it was subsequently lost. (L/B Ex. 1, pp. 5-6.)

209. Rick and Tina orally agreed to lend the necessary funds to Shawn. (L/B Ex. 1, p. 5; L/B Ex. 2, p. 4; L/B Ex. 3, pp. 1-2; L/B Ex. 22, pp. 20-21.) However, Rick warned Shawn that if the station did not perform he might cut off funds. (L/B Ex. 22, p. 26.) The terms of repayment were not established, except that the rate of interest would be 10 percent and Shawn would begin to pay the loan back as the station became profitable. (L/B Ex. 22, pp. 19-20.)

210. After it was decided to proceed with the application, Tillotson and Dawson prepared Shawn's application. During December 1985, Tillotson had at least one telephone conversation with Shawn's sister, Kathleen, and two telephone conversations with Rick about Shawn's application. (L/B Ex. 24, p. 6.) Tillotson also sent Shawn two letters advising her to review the

draft application and informing her that her application had been filed. (Western Ex. W31, pp. 6-9.)

211. Post-Filing Activities. Subsequent to the filing of Shawn's application on December 31, 1985, but prior to the October 8, 1987, release of the *Hearing Designation Order* in the Montecito proceeding, *LNJ Communications*, 2 FCC Rcd 6072 (MMB 1987), Tillotson spoke with Rick on a number of occasions about the Montecito situation or copied him with correspondence that was addressed to Shawn. (L/B Exs. 8 and 9; L/B Ex. 16, p. 3; L/B Ex. 24, pp. 9, 13-14; L/B Ex. 25, pp. 59-60.) More often, however, Tillotson would not send Rick copies of letters sent to Shawn. (Western Ex. W31, pp. 11-20.) Tillotson's practice was to copy Rick when Tillotson believed there was some reason for doing so. In this regard, Tillotson believed there was nothing wrong with his sending Rick general information concerning the Montecito proceeding and Shawn's chances for winning in view of Rick's interest as a parent who was funding his daughter's application. (Tr. 3751.) For his part, Rick would discuss Shawn's application with Tillotson to ascertain its progress and prospects. (L/B Ex. 25, p. 58; Tr. 3555-56.) Rick and Shawn would also discuss her application. (L/B Ex. 20, p. 46.)

212. In early 1986, Rick and First Capital Corporation of Chicago formed Western Cities. (Western Ex. W4, p. 2.) Rick became president and chief executive officer and held 100 percent of the company's voting stock and 40 percent of its other stock. (L/B Ex. 4, p. 4.) As of the time of the initial hearing sessions in the instant proceeding, *i.e.*, as of September 1991, Rick held the positions of President, Treasurer, and Director of Western Cities. Rick also held 78.75 percent of Western Cities' issued and outstanding Class A Common (voting) stock, and 76.25 percent of its issued and outstanding Class B Preferred (nonvoting) stock. (Western Ex. W1, pp. 1-3.)

213. On May 8, 1986, Western Cities entered into an agreement to purchase the assets of Lincoln Park Broadcasting, Inc. ("Lincoln"), licensee of Station KQKS(FM), Longmont, Colorado. (L/B Ex. 4, p. 24.) On May 20, 1986, Western Cities and Lincoln filed an application to assign the license of Station KQKS. (L/B Ex. 4.) The application reported Rick and Shawn's relationship, and that Shawn had a pending application for a new station at Montecito. (L/B Ex. 4, p. 21.) After Commission grant of the application, Western Cities took control of Station KQKS on December 15, 1986. (L/B Ex. 20, p. 37; Western Ex. W22, p. 1.) Neither Tillotson nor Shawn focused on the need to amend Shawn's application to report Rick's acquisition of KQKS until the matter was raised during Shawn's December 1987 deposition in the Montecito proceeding. (L/B Ex. 20, p. 36; Tr. 3744-45.)

214. As noted above, the Montecito *Hearing Designation Order* was released on October 8, 1987. Between that date and January 1988, Tillotson telephoned or wrote to Shawn about a variety of matters with respect to her application. (L/B Ex. 24, pp. 27, 31-34, 36-41; Western Ex. W31, pp. 21-29.) During that period Tillotson also wrote to Rick to advise him that Rick needed to reduce to writing his commitment to lend Shawn money to build and operate the Montecito station. (L/B Exs. 10 and 11.) In addition, Tillotson spoke to Rick (together with Shawn) about the prospects for Shawn's application and about various settlement proposals. (L/B Ex. 24, p. 39.) Rick and Shawn also discussed settlement offers, and he advised her about how much he would be willing to lend her so that she could buy out competing applicants. (L/B Ex. 20, pp. 18-19.) Tillotson usually noted whether he was talking or writing to Rick or Shawn. Occasionally, however, Tillotson simply noted that he had a telephone conversation with "Phalen." (E.g., L/B Ex. 24, p. 27, entry for October 8, 1987.) In those instances, Tillotson generally spoke with Shawn. (L/B Ex. 25, pp. 94-95.)

215. Tillotson regularly conversed with Rick both before and after the filing in the Montecito proceeding of motions to enlarge the issues to determine whether Rick was a real party in interest in Shawn's application. Some of the conversations concerned Montecito, particularly the real party in interest issue. However, most of the conversations concerned other matters. (L/B Ex. 34, p. 2.)

216. In addition, between January 13 and May 13, 1988, Tillotson sent Rick copies of at least eight letters addressed to Shawn. The letters usually concentrated on the real party in interest issue or noted amounts of money that other parties would accept for the dismissal of their applications. (L/B Exs. 12, 13, 14, 33, 34, 35, 39 and 40.) Tillotson sent copies to Rick because Tillotson believed the matters discussed concerned Rick directly. (Tr. 3747.) During this same approximate period (January to June 17, 1988), Tillotson sent to Shawn 12 letters that he did not send to Rick. (Western Ex. W31, pp. 30-45.)

217. Following the addition of the real party in interest issue against Shawn's application, Tillotson recommended to both Shawn and Rick that Shawn direct her attention on finding a way to settle the Montecito proceeding. (Western Ex. W28, pp. 3-4.) To that end, Shawn and two other applicants, Claudia Bratton and LNJ Communications, held a settlement meeting in Santa Barbara on April 18, 1988. Rick attended the meeting and did most of the talking on Shawn's behalf. No settlement was reached. (Tr. 3409-11.)

218. Sometime during the week of June 19, 1988, Rick received a telephone call from a man who identified himself as Bob Finkelstein.⁸ Finkelstein told Rick that he was an investor in Spirit Broadcasting ("Spirit"), a competing applicant in the Montecito proceeding. He asked Rick if he would be interested in settling the Montecito proceeding by a merger. Rick told Finkelstein that he would pass the merger proposal on to Shawn who was away at school at the time. He also told Finkelstein that one thing which would have to be worked out would be the spinning-off of 15 percent of the merged entity's stock to a sales manager. (Western Ex. W27, p. 12.)

219. At the time, Shawn and Rick had in mind spinning-off 15 percent of Shawn's stock to Joe Bayliss who would serve as the station's sales manager. Rick had known Bayliss since 1984 when he had helped Bayliss' parents with a station they owned in Santa Maria. Rick had worked with Bayliss and thought highly of his ability as a salesman. (Tr. 3334-35, 3340.) Shawn also had known Bayliss for two to three years when she and her father discussed the possibility of offering him stock. Rick testified that he could not recall whether the idea of offering Bayliss stock originated with him or with Shawn. (Tr. 3440.) According to Rick, prior to the filing of Shawn's application in 1985, he and Shawn discussed giving stock to an experienced sales manager. (Tr. 3334.) At that time, Shawn had in mind an employee (not Bayliss) of another broadcasting company. (Tr. 3337.)

220. After speaking with Finkelstein, Rick called Tillotson and told him of the possibility of a settlement of the Montecito case by merger. Tillotson discussed the proposed merger with Spirit's attorney, with Shawn, and with Western Cities' corporate attorney, Jim Clarke. Tillotson spoke with Clarke because he had been told that Shawn had retained him to advise her on the business/corporate law aspects of the proposed merger. He also discussed the merger with Rick, whose willingness to supply Shawn's portion of the settlement funding was an essential element of the proposal. (Western Ex. W28.)

221. At Shawn's request, Rick spoke with Finkelstein again on approximately June 23, 1988. He told Finkelstein that Shawn would have to meet with him before any agreement could be finalized and that Shawn insisted on spinning-off 15 percent of the merged entity's stock to a sales manager (7.5 percent from Spirit and 7.5 percent from Shawn). (Western Ex. W27, p. 2.)

⁸ Western Cities attempted to have a subpoena served on Finkelstein to obtain his appearance in this proceeding, but was unsuccessful. (Western Ex. W29.)

22. On June 27, 1988, the day the hearing in the Montecito proceeding was to commence, Spirit and Shawn presented to the Presiding Judge in that case an agreement in principle which provided for the merger of their applications and for the merged entity to pay all other applicants for the dismissal of their applications. (L/B Ex. 59, pp. 6-8.) At the hearing a Memorandum of Agreement ("MOA") was presented to the Presiding Judge. (L/B Ex. 59, p. 8.) The MOA bore a place for the signatures of Michael Durden, General Partner of Spirit, and Shawn, but was unsigned. The MOA did not state that it was contingent upon Shawn meeting with Finkelstein or the spin-off of 15 percent of the merged entity's stock to a sales manager. (L/B Ex. 62; Tr. 3878.) In presenting the terms of the MOA to the Presiding Judge, Spirit's counsel, Eric Kravetz, did not state that there were any conditions to the MOA. (L/B Ex. 59, pp. 6-8.) Kravetz, who had negotiated the settlement on behalf of Spirit, believed that the MOA included all material provisions of the settlement. (Tr. 3876.) Kravetz did tell the Presiding Judge, however, that the MOA was "preliminary to a more formal agreement." (L/B Ex. 59, p. 305.)

223. Based on Kravetz's representations, the Presiding Judge granted the parties in the Montecito proceeding a 30-day continuance to prepare and file their settlement papers. (L/B Ex. 59, p. 29.) Present at the hearing were Shawn and Rick Phalen. (Tr. 3275-76.) Shawn did not say anything at the hearing to her attorney about her understanding of the need to spin-off stock as a condition of the settlement because she did not think it would present a problem. (L/B Ex. 26, p. 112.)

224. While the MOA presented to the Presiding Judge on June 27, 1988, specified the split of stock between Spirit and Shawn and other matters concerning the settlement, it did not include a number of other subjects which still needed to be worked out. Among the points still to be determined were how the construction and operation of the station was to be funded, who would be in charge of the day-to-day operation of the station, the staffing of the station, and the equity, if any, to be given to a sales manager. (Tr. 3801-02.)

225. According to Tillotson, as a condition of Rick's funding Shawn's share of the merged entity, Shawn would have to work out a deal with Finkelstein that she was comfortable with, and Shawn would have to say she wanted to enter into the merger. The decision was Shawn's to make. (Tr. 3787.) To Tillotson's understanding, there was no precondition that Shawn and Finkelstein must meet before the agreement could go through. (Tr. 3788.) Rick did, however, decline to put up Shawn's share of the funding for the settlement agreement until Shawn had met with Finkelstein and Rick was sure there was a deal. (Tr. 3803.)

226. When Rick declined to put up the money, Tillotson attempted to reach Kravetz, but Kravetz had left town on vacation and could not be contacted. (Tr. 3803.) When Kravetz returned from vacation he was informed by his partner that the merger had fallen apart. (Tr. 3897.)

227. Because of the issues which had been raised in the Montecito case with regard to Shawn's application, it was understood that Shawn could not have control of the merged entity. (L/B Ex. 59, p. 7.) Thus, the proposed split of equity was 49 percent to Shawn and 51 percent to Spirit. (Tr. 3494.) Tillotson assumed that, because of the 49-51 percent equity split in the merged entity, the equity interest of the sales manger would have to be nonvoting. (Tr. 3793.) In any case, Tillotson did not tell counsel for the competing applicants that the Spirit-Shawn Phalen merger was conditioned upon a spin-off of stock to a sales manager because he understood that it was not. (Tr. 3693.)

228. Rick always understood that the equity contemplated for Bayliss was nonvoting. Rick understood that Spirit would have to have control and that, if Bayliss' stock were voting, then Spirit would lose control. Rick believed that no sophisticated businessman would enter into a deal whereby he would lose control. Rick, therefore, did not believe Spirit would enter into such a transaction. (Tr. 3493-95.)

229. Following the June 27, 1988, hearing session, Kravetz, Tillotson, and the Phalens ate lunch together. During the luncheon discussion, the fact that neither Shawn nor Spirit's general partner had sales experience was raised. It was agreed that it might be a good idea for the merged entity to offer someone with such experience an opportunity to earn equity in the station. There was no agreement, however, that, as a condition of the merger, stock would be spun-off to an employee. Nor was there any discussion of the nature of the stock interest that would be spun-off. Also, while it was discussed that Shawn and Finkelstein should meet, it was not agreed that their meeting was to be a condition to the settlement agreement. (Tr. 3387-93.)

230. On July 3, 1988, Finkelstein telephoned Rick and asked if he could visit with him the next day. On July 4, 1988, Finkelstein arrived at Rick's home with an attorney. From their conversation, Rick concluded that Finkelstein wanted to deal with him rather than Shawn. Finkelstein offered to cut Rick in on a deal to sell advertising on a cable channel in conjunction with the Montecito radio station. Rick declined the offer and again mentioned the need to spin-off stock to a sales manager. (Western Ex. W27, p. 3.)

231. Shawn understood that, at his July 4, 1988, meeting with Finkelstein, her father had told Finkelstein that 10 percent of the merged entity's stock had to be spun-off to a sales manager or the deal was dead (5 percent from Spirit and 5 percent from Shawn). (L/B Ex. 26, pp. 100, 104-06.) According to Shawn, the decision to offer 10 percent, rather than 15 percent, to a sales manager was made by her father when he spoke to Finkelstein. (L/B Ex. 26, pp. 123, 125.) Her father did not talk to her about spinning-off 10 percent rather than 15 percent before he had proposed it to Finkelstein. (L/B Ex. 26, p. 125.) Subsequent to Rick's meeting with Finkelstein, Rick asked Shawn what she thought of spinning-off 10 percent and Shawn said it was fine with her. (L/B Ex. 26, p. 126.) Shawn understood that her father had presented the 10 percent spin-off of stock to Finkelstein as "nonnegotiable." (L/B Ex. 26, p. 127.)

232. On July 15, 1988, Shawn returned home from school and met with Finkelstein. After the meeting she expressed uneasiness to her father about the prospect of doing business with Finkelstein. The next day, July 16, 1988, Shawn and Bayliss met with Finkelstein. After this meeting, Shawn told her father that she did not like Finkelstein's ideas for running the station and had decided not to go through with the Spirit merger. (Western Ex. W27, p. 4.) After her meetings with Finkelstein, Shawn telephoned Tillotson and told him that she did not like Finkelstein and did not want to go into business with him. Tillotson recommended to Shawn that she go through with the merger regardless of her feelings about Finkelstein because going through with the hearing was a much less attractive option. (Western Ex. W28, pp. 8-9.)

233. Following the release of the *Initial Decision* in the Montecito proceeding, 4 FCC Rcd 5714 (I.D. 1989), a settlement agreement was effectuated between Shawn, James Evans, and Claudia Bratton (two other competing applicants in that proceeding), which provided for the dismissal of the Bratton application. Under the terms of the agreement, Shawn would have been required to pay Bratton \$80,000 had Shawn obtained the Montecito construction permit. The \$80,000 would have come from Rick. (Tr. 3361-62.)

234. At the time the settlement with Bratton was pending, there was also a lawsuit pending against Bratton in the California state courts. The plaintiff in the case was Westcom, Inc. ("Westcom"), a company owned by Rick's daughter Kathleen (80 percent) and Bayliss (20 percent).⁹ Westcom was the licensee of an FM station in Grover City, California. Rick, his wife Tina, Shawn, Kathleen, and Bayliss had guaranteed the loan which Westcom used to purchase the station. The loan was secured by Rick and Tina's home. Bratton (and another competing

⁹ Westcom's original shareholders were Shawn (40 percent), Kathleen (40 percent), and Bayliss (20 percent). (Tr. 3507.)

applicant) had challenged Westcom's qualifications before the Commission, and Westcom had countered by suing Bratton (and the other applicant) in the California courts. Tillotson told Rick that Bratton's attorney was insistent that Westcom's lawsuit against Bratton be dismissed if the settlement with Bratton in the Montecito proceeding was to reach fruition. (Tr. 3362-64, 3484-85, 3509, 3536.)

235. Rick denied that he had any control over Westcom or its lawsuit against Bratton. The funds for the suit came from a loan by the Bank of Santa Maria which was personally guaranteed by Rick. According to Rick, the decision to file the lawsuit against Bratton was made by Bayliss. Also, according to Rick, the decision to dismiss the lawsuit against Bratton was made by Bayliss. (Tr. 3486-89.) Rick could not recall whether he recommended settlement of the Westcom lawsuit to either Kathleen or Bayliss. According to Rick, he left decisions on the lawsuit up to them. (Tr. 3365-71.)

236. Westcom's station is no longer on the air. The station was losing money and went off the air when Rick decided not to finance it any longer. (Tr. 3542-45.) Rick is paying the remaining indebtedness on the bank loan. (Tr. 3545.)

237. According to Rick, he did not buy the Grover City station for himself, and he let his daughters run it because he wanted to help them get into the broadcasting business. (Tr. 3510-11.) After Westcom purchased the station, Bayliss became general manager. Shawn worked for the station, as did Kathleen. Rick acknowledged that, on occasion, Bayliss would call him for advice on such things as sales, personnel, and whether to buy a rating book. Although he was willing to help Bayliss, Rick claimed that he did not tell Bayliss what to do. (Tr. 3515.) When Bayliss left the station's employ, Kathleen hired his replacement. (Tr. 3544.) Kathleen was a college student who worked at the station during vacations and summer breaks. (Tr. 3545.)

238. Shawn ultimately dismissed her Montecito application in exchange for \$130,000. Before accepting that amount, Shawn discussed the offer with Rick, who agreed that the amount was acceptable. Rick had advanced \$175,000 toward the prosecution of Shawn's application. Of the \$130,000 received in settlement, \$25,000 went to Tillotson and \$5,000 went to Shawn. The remaining \$100,000 went to Rick. Thus, Rick was out-of-pocket \$75,000 on the Montecito venture. (Tr. 3375-76.) Shawn did not have the resources to pay her father for the loss, and he intended to forgive the indebtedness. (Western Ex. W27, p. 7.)

239. Rick Phalen's Broadcast and Other Activities. As noted above, Rick made a personal profit of \$7 million from the sale of Western-I. Since selling Western-I, Rick purchased Station KQKS, Longmont, Colorado, acted as a receiver for five stations in California, written two books, and had third and fourth books in progress. According to Rick, he was not interested in owning a station where he lived because local ownership would have involved him more than he wanted to be involved in the operation of the station. (Tr. 3506.)

240. According to Rick, the reason he did not just buy a station for Shawn was his belief that she could obtain a station more economically through the comparative hearing process. He felt that the MM Docket 80-90 proceedings provided an excellent opportunity for his daughter to start out in business for herself. (Tr. 3506-07.)

241. Tillotson testified that when he talked to Rick, Rick was not interested in talking about Shawn's application. Tillotson believed that this was because Rick wanted to insure that Shawn was involved in the project and made the decisions. When Shawn received an offer of money to dismiss her application, Tillotson recommended that she take the offer. Shawn, however, decided that she wanted the station and rejected the offer. It was Rick's position that the decision to settle or not was Shawn's to make. (Tr. 3775-80.) When the offer from James Evans was made in 1992, it was Shawn who made the decision to accept it. (Tr. 3375-76.)

CONCLUSIONS OF LAW

Issue (c) -- Misrepresentation/Lack of Candor Issue

242. This issue was specified to determine whether Western Cities misrepresented facts, or was lacking in candor, by answering "Yes" to Section I, Item 3, of its January 4, 1989, License Application. That item asked whether "all the terms, conditions, and obligations" set forth in Western Cities' construction permit had "been fully met." The specific condition to which this issue was addressed required Western Cities to "correct[] all interference caused to all facilities operating at the [S]ite prior to the arrival of KQKS(FM)." The findings establish, and it is concluded, that, in answering Item 3 in the affirmative, Western Cities had no intent to deceive the Commission. On the contrary, the evidence establishes that Western Cities' answer was made in good faith. Further, Western Cities' position with respect to the December 27, 1988, FCC Letter and the condition in question, and the basis for that position, was fully disclosed to the Commission *prior to* Western Cities' affirmative answer to Item 3. Under these circumstances, it cannot be concluded that Western Cities had a "deceptive intent" by answering

that item in the affirmative. Consequently, this issue must be resolved in Western Cities' favor. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983); *see also Muncie Broadcasting Corp.*, 89 FCC 2d 123, 128-29 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 837 (Rev. Bd. 1981).

243. In reaching this determination, the state of mind of Tillotson and Pyle was of critical significance. In this regard, the findings establish, and it is concluded, that both Tillotson and Pyle did not believe that KQKS was the cause of any interference to other users of the Site, and were of the view that KQKS was, for that reason, already in compliance with the condition specified in the FCC Letter at the time Item 3 was answered. Further, Tillotson believed that all the complainants were newcomers to which Western Cities had no legal obligation. These views were based upon Tillotson's understanding of the Commission's definition of "interference," his conversations with Cutforth, Schipper, Kaiser, and Sebastian, and Western Cities' experiences with Mr. Eldorado and Mr. Boulder.

244. Moreover, Tillotson vehemently disagreed with the finding contained in the FCC Letter that KQKS was the source of all destructive interference at the Site. This was evidenced by the filing of Western Cities' Petition for Partial Reconsideration and Clarification on December 29, 1988, six days *before* the filing of its License Application. When that Petition is read in conjunction with Western Cities' License Application, it is clear that Western Cities disclosed to the Commission its view that there was no interference at the Site, that Western Cities was not the cause of the problems alleged to exist at the Site, and that, even if interference at the Site existed, all the affected entities were newcomers. Although the License Application did not state the basis for Western Cities' affirmative answer to Item 3, the Petition for Partial Reconsideration and Clarification clearly did so. In light of this Petition, it cannot be concluded that Western Cities had any intent to deceive the Commission by answering Section I, Item 3, in the affirmative. These matters will be discussed below.

245. Tillotson's Understanding of "Interference." Tillotson was responsible for making the determination that Western Cities could certify in its January 4, 1989, License Application that it was in compliance with the interference condition contained in the FCC Letter. He was the "point man" who worked directly with Schipper and Western Cities' consulting engineers, Cutforth and Dawson. Tillotson used the information he had obtained from the engineers and then applied his understanding of the Commission's definition of "interference."

246. With respect to his understanding of the term "interference," Tillotson relied on Dawson's explanations concerning the circumstances under which an undesired signal, or "noise," constituted "interference," and his own interpretation of the definitions of "interference" and "harmful interference" which were contained in Section 2.1 of the Commission's Rules. Tillotson's interpretation of these technical concepts was influenced by Dawson's explanations.

247. Dawson advised Tillotson that the mere fact that KQKS' signal could be heard on two-way radio channels did not mean KQKS was causing "interference" to those channels. Dawson told Tillotson that for purposes of determining whether any interference existed, the music which could be heard on the channel was no different from other types of background noise. Dawson explained to Tillotson that some background noise was always present, and the question of whether the noise constituted interference was dependent upon the strength of the noise in relation to the desired signal. Tillotson understood that so long as the noise did not significantly degrade the quality of the communications on the channel, the noise would not be considered interference. Dawson also told Tillotson that the level of noise that was acceptable on a particular channel varied depending upon the type of communications going over the channel.

248. Tillotson discussed his understanding of the term interference with Cutforth, who agreed with Tillotson's interpretation. Cutforth stated that "interference," in the traditional sense, occurred only when communications were significantly degraded so that messages were not easily communicated. Cutforth believed the mere annoyance caused by music being heard in the background did not meet the traditional definition of "interference" when the music level was so low that speech intelligibility was not compromised.

249. Tillotson's Conversations with Cutforth. Cutforth was hired in November 1988 as a consultant to Western Cities' counsel in the Colorado civil suit. Cutforth's responsibility was to determine whether KQKS' operation was causing any problems to other facilities at the Site, regardless of whether those facilities preceded KQKS' arrival at the Site, or whether any problems discovered constituted "interference" as defined by the Commission's rules. Cutforth also was to make recommendations as to how any problems that might be identified could be resolved.

250. Cutforth studied the Site over a six-month period from November 1988 through April 1989. None of the tests Cutforth conducted during that period indicated that KQKS' operation was degrading or desensing communications on the two-way facilities located at the Site. The only recurring and traceable symptom Cutforth observed was KQKS music playing in

the background on certain channels. Cutforth never observed the music at a level which was high enough to impede communications. While monitoring the two-way communications on Schipper's scanner, Cutforth never heard anyone have to repeat themselves.

251. Based on his findings and observations at the Site, Cutforth concluded that all the problems resulted from the direct ingress of RF into exposed circuits in each repeater, and that the RF levels inside the communications building were being exacerbated by the haphazard installation and grounding of incoming coax cables which were constantly being added. The ungrounded coax cables made it difficult to reduce the RF levels inside the transmitter building, and Mr. Eldorado's refusal to permit Cutforth to improve the shielding and filtering of unshielded circuits and wiring made it nearly impossible to lower the inherent pickup levels of the repeater systems. Nevertheless, despite the inadequate grounding of the coax cables and the ineffective shielding of the communications building, Cutforth believed the effects from KQKS' operation were mild and did not interrupt or interfere with two-way radio communications.

252. Following his visits to the Site in November 1988, Cutforth informed Tillotson that he had measured the RF levels inside the building where the two-way equipment was located, and found no evidence that any of the equipment was being desensitized by KQKS. Cutforth also advised Tillotson that although he heard KQKS audio on one or more channels over Mr. Eldorado's walkie-talkie, the music was at such a low level it would not have interfered with communications on the two-way channels.

253. Cutforth also gave Tillotson a detailed report after his December 11, 1988, visit to the Site. At that time, Cutforth informed Tillotson that although KQKS' signal could be heard over certain two-way frequencies, it was barely observable and, to the extent it could be observed, the level of KQKS audio was so low it would not interfere with, nor degrade, communications on the two-way channels. Cutforth advised Tillotson that he again found no evidence that KQKS was causing desense interference at the Site.

254. On December 28, 1988, after Tillotson had received the FCC Letter, he and Cutforth discussed the Commission's finding over the telephone while Cutforth was at the Site. In that conversation, Cutforth advised Tillotson that even without the capacitors which he and Schipper had been forced to remove, the only problem which existed at the Site was low-level music on certain Boulder frequencies, and it was not preventing communications from taking place. Thus, Cutforth reconfirmed the advice he had been giving to Tillotson all along that, based on his observations and tests at the Site, his monitoring of Schipper's scanner, and the standard

definition of "interference," KQKS was not causing interference to any other facility at the Site. Therefore, Cutforth and Tillotson concluded that KQKS was in full compliance with the interference condition set forth in the FCC Letter.

255. Tillotson's Conversations with Schipper. Tillotson communicated with Schipper on a regular basis during November and December 1988 concerning Schipper's observations of the problems at the Site, as well as his monitoring of the quality of communications on the two-way channels which allegedly were receiving interference. In those discussions, Schipper confirmed what Cutforth had told Tillotson regarding Cutforth's observations of the phenomena during his visits to the Site. Although KQKS audio was detectable on occasion on certain frequencies operated by Mr. Boulder, Tillotson was told that the level of audio was far below that which would interfere with or degrade communications on the channels. Schipper also informed Tillotson that although he occasionally heard KQKS audio while monitoring certain frequencies on his scanner, the level of the audio was always very low and was not noticeable when communications were taking place on the frequencies.

256. After sending the FCC Letter to Schipper by telecopy on December 27, 1988, Tillotson advised Schipper of his interpretation of the Letter. Although Schipper understood the FCC Letter to mean that the Commission had found that KQKS was causing destructive interference at the Site, Schipper had not observed any interference at the Site and believed the Commission was wrong in its determination. Therefore, Schipper deferred to Tillotson's judgment with respect to the interpretation of the FCC Letter and the interpretation of "interference" as defined by the FCC rules.

257. Schipper also had conversations with Tillotson after December 29, 1988, and prior to January 3, 1989. During those conversations, Schipper informed Tillotson that he was continuing to monitor his scanner, he had not detected any evidence of decreased range, and any KQKS audio he observed was at a very low level.

258. Tillotson forwarded a partially completed draft of the License Application to Schipper on December 28, 1988, and advised Schipper sometime between December 29, 1988, and January 3, 1989, that, based on their discussions, as well as Tillotson's discussions with Cutforth and Dawson, KQKS was in compliance with the interference condition contained in the FCC Letter. Accordingly, Schipper completed the engineering portion of the License Application and certified that portion on January 3, 1989.

259. Tillotson's Conversations with Kaiser and Sebastian. Tillotson had at least four telephone conversations with Diane Kaiser, Joslins' attorney, in an attempt to ascertain the severity of the problem. After the filing of Sebastian's October 10, 1988, statement complaining that music from KQKS was heard on the channel used by Joslins' security personnel, Kaiser told Tillotson she did not believe the problems Joslins was experiencing were as serious as the statement indicated. She also told Tillotson she would advise Sebastian to call KQKS whenever the problem was observable. Although Tillotson requested Kaiser to call him directly if the problems Sebastian complained of persisted, she never called Tillotson regarding any problems.

260. Tillotson contacted Kaiser again after the filing with the Commission of Sebastian's October 20, 1988, letter alleging that the music on the Joslins frequency had made it impossible for their security officers to communicate with each other during the apprehension of a shoplifter. Tillotson asked Kaiser to have Sebastian notify KQKS whenever such problems were observed. Tillotson also repeated his request that she call him if the problems persisted.

261. On October 25, 1988, Tillotson spoke directly with Sebastian. Tillotson testified that Sebastian told him he heard KQKS music in the background of the Joslins frequency, but that with the exception of the isolated instance described in the letter, the music did not interfere with communications on the channel. Tillotson also stated that he requested Sebastian to call Schipper directly whenever he heard KQKS audio on the Joslins frequency.

262. Tillotson's last conversation with Kaiser occurred on December 28, 1988, when he called her to find out if the problems Sebastian had complained of were continuing. Kaiser told Tillotson she was not aware that they were, and stated she would check with Sebastian and call Tillotson back if there was any problem. Kaiser never called Tillotson back.

263. Western Cities' Experience with Mr. Eldorado. The lease agreement between Western Cities and Eldorado required Western Cities to purchase and install an MSA at the Site. As part of the lease agreement, Mr. Eldorado insisted upon an addendum, approved by KBCO, which provided KBCO with complete protection from any disruption of service during the construction of the MSA. The addendum also ensured that no work could begin on the MSA until a comprehensive plan for the design and installation of the MSA, including a directional antenna pattern equivalent to KBCO's existing pattern, had been approved by KBCO or by an impartial consulting engineer. The addendum further provided that any dispute between Western Cities and KBCO regarding the MSA proposal would be resolved by referring the dispute to a consulting engineer whose decision would be binding upon both parties.

264. However, in June 1987, Mr. Eldorado provided a supporting declaration to the First Objection to the MSA Application, which Glaser had filed on behalf of KBCO. When Tillotson called Mr. Eldorado to find out why he had supported KBCO's objection, Mr. Eldorado insisted that he wanted KQKS to proceed as quickly as possible with the MSA, and told Tillotson that if KQKS did not move quickly, there were other stations waiting to take over the project. Tillotson informed Mr. Eldorado that KQKS could not begin any work on the project until the FCC granted its MSA Application, and that the First Objection would delay any action on that application for months. Tillotson also reminded Mr. Eldorado of the substance of the lease addendum upon which he had insisted. Nevertheless, Mr. Eldorado refused to withdraw his supporting declaration.

265. In a further effort to have the First Objection withdrawn, Tillotson encouraged Mr. Eldorado to hire an attorney who could negotiate with Western Cities and KBCO to resolve the impasse concerning the progress of the MSA. Tillotson also offered to have Western Cities pay the expenses for such an attorney. However, Mr. Eldorado rejected Tillotson's proposal.

266. During Tillotson's June 1987 telephone conversation with Mr. Eldorado concerning his supporting declaration to the First Objection, Mr. Eldorado mentioned that KQKS' operation was causing interference to Metro Mobile's two-way equipment operating from the Site, and explained that the problem was due to the proximity of KQKS' antenna to the building in which the two-way equipment was located. Mr. Eldorado stated it was important to move quickly to construct the MSA because moving KQKS' operation would eliminate these problems. However, when Schipper suggested to Mr. Eldorado that moving KQKS' antenna to a higher point on the tower would help alleviate the RF in the building, Mr. Eldorado initially rejected Schipper's proposal, claiming that various levels of the tower already were dedicated to transmit and receive antennas on various frequencies.

267. In the fall of 1987, Tillotson was advised by either Cutforth or Dawson that the problems affecting Metro Mobile's facilities would probably be eliminated when the MSA was completed because the MSA would be located much higher on the tower than the location Mr. Eldorado had designated for KQKS' single antenna. In light of this information, Western Cities again proposed to Mr. Eldorado that KQKS be permitted to raise its antenna as an interim measure until the MSA was constructed. This time Mr. Eldorado agreed to permit Western Cities to raise KQKS' antenna approximately 20 feet. Following this move, which occurred on or about December 1, 1987, Mr. Eldorado stated that, with the exception of Metro Mobile, all of the

interference problems at the Site had been resolved. Mr. Eldorado also stated that Metro Mobile's problems were sufficiently reduced to a level with which they could live.

268. In addition, Mr. Eldorado's interference complaints were sporadic. Although Mr. Eldorado had mentioned that KQKS was causing interference to Metro Mobile's facilities in June 1987, he made no mention of any interference problems during Tillotson's conversation with him in September 1987. At that time, Mr. Eldorado complained only of Western Cities' delay in proceeding with the MSA project. Moreover, Pyle occasionally met with Mr. Eldorado prior to the filing of the eviction suit in July 1988. Pyle stated that his conversations with Mr. Eldorado also involved discussions of how Western Cities would proceed with the MSA, but he had no recollection of Mr. Eldorado ever mentioning a problem with the two-way facilities at the Site.

269. In the spring of 1988, Mr. Eldorado told Schipper there was an increasing problem of interference at the Site, and that he had received a letter from Mr. Boulder concerning interference. However, after Schipper contacted Mr. Boulder on April 26, 1988, to inquire about the problem, Mr. Boulder told Schipper the letter to which Mr. Eldorado was referring was written in late 1987 and did not identify KQKS as a source of Boulder's problems. Moreover, although Mr. Boulder told Schipper he was having a problem with desense, Mr. Boulder stated he was not experiencing a problem with KQKS audio on his repeaters as he apparently did the previous July.

270. Mr. Eldorado also refused to work with Western Cities in attempting to resolve the problems at the Site. Following the filing of the Second Objection by Eldorado (on August 1, 1988) and Boulder (on August 8, 1988), Tillotson contacted the attorneys for Mr. Eldorado and Mr. Boulder to inquire about the possibility of the parties working together in a cooperative effort to resolve the interference problems upon which the Second Objection was based. However, Tillotson's proposal was rejected. In addition, following Western Cities' July 1, 1988, amendment proposing to abandon the MSA and requesting permanent authority to operate from its STA facility at the Site, Mr. Eldorado filed an eviction suit against Western Cities alleging, *inter alia*, that Western Cities was in breach of the lease agreement because it no longer intended to construct the MSA. Further, although KQKS wanted to improve the shielding of the communications building by painting the floor and installing a standard grounding feedthrough bulkhead, Mr. Eldorado rejected both of these proposals.

271. In light of Mr. Eldorado's declaration in support of the First Objection, the sporadic nature of his interference complaints, and the filing of his eviction suit following Western Cities'

abandonment of the MSA, Tillotson believed Mr. Eldorado wanted to evict Western Cities from the Site because he was negotiating with other stations who were going to give him a better deal with respect to constructing the MSA. Indeed, during the October 1988 meeting with the Commission and Glaser, Tillotson advised the Commission that there was no way Western Cities and Mr. Eldorado were ever going to reach an agreement regarding interference because it was in Mr. Eldorado's interest to pursue his civil suit and get Western Cities evicted from the Site by claiming that KQKS was causing interference. Tillotson believed that regardless of the actual circumstances, Mr. Eldorado was going to tell the Commission that KQKS was causing interference.

272. Western Cities' Experience with Mr. Boulder. The first time KQKS received any indication that its operation might be causing problems to Boulder's two-way facilities at the Site was in July 1987 when Mr. Eldorado identified Boulder as a complainant. When Schipper contacted Mr. Boulder on July 29, 1987, to inquire as to the nature of the problem, Mr. Boulder told Schipper that KQKS audio could be heard at a barely audible level on one of Boulder's seven frequencies, but that he did not consider this to be a problem. Mr. Boulder did not indicate he was experiencing any other problems. Schipper also telephoned Mr. Boulder in August 1987 regarding a weak signal problem he was experiencing. However, Mr. Boulder gave no indication that the problem might be due to KQKS, nor did he describe the problem as one of interference.

273. On August 28, 1987, Schipper received a telephone call from Mike Johnson of Concord Express, which at that time was a Boulder customer. Johnson informed Schipper that Concord Express was experiencing transmission problems, and that Boulder had told him KQKS was the source of its problem. Schipper telephoned Boulder and spoke to Robert Foley, a Boulder employee. Foley explained to Schipper that Concord Express was using Boulder's "worst repeater" and that Boulder was hoping the repeater would hold up until Boulder had the funds to replace it. Foley told Schipper that although KQKS was not the problem, Boulder had told Concord Express that KQKS was the problem in order to appease them. Foley also stated that it was handy to have KQKS at the Site on which to blame problems.

274. Upon calling Concord Express back to inquire regarding the nature of the problem they were experiencing, Schipper confirmed that Boulder was indeed giving its customers false information concerning KQKS. Johnson told Schipper that when they keyed the repeater, they could hear two-way dispatches in addition to their own. He also informed Schipper that Concord Express never heard KQKS programming over their repeater. While monitoring the Concord

Express frequency following his conversation with Johnson, the only disturbance Schipper heard on the frequency was other two-way dispatches mixing with Concord Express' own dispatches.

275. On October 29, 1987, Mr. Boulder complained to Schipper that he was having a problem with desense in his repeaters. Mr. Boulder indicated the problem was most prevalent during the day, but that it improved dramatically at night. Schipper explained to Mr. Boulder that because KQKS was an FM station, its operating characteristics were the same during the day and night. Nevertheless, Schipper offered to help Mr. Boulder investigate the problem to determine whether there was any relationship between the problem he had described and KQKS' operation. Schipper followed up on this conversation with Mr. Boulder in early November 1987 by calling him and arranging a meeting at the Site the following day. However, Mr. Boulder telephoned Schipper the next day and cancelled the appointment.

276. Schipper also spoke to Mr. Boulder in late 1987 concerning the relocation of his equipment from one room in the communications building to another. Mr. Boulder explained that he was installing a paging system and planned to expand the number of repeaters. He did not say anything to Schipper about moving his equipment due to interference.

277. Boulder did not experience any problem with KQKS audio on its repeaters from the fall of 1987 through the spring of 1988. In April 1988, Mr. Boulder mentioned to Schipper a problem Boulder was having with desense. Schipper agreed to meet with Mr. Boulder at 10:00 p.m. on the evening of May 1, 1988, to conduct tests. Schipper waited for Mr. Boulder for approximately 40 minutes, but Mr. Boulder failed to show up. Schipper called Mr. Boulder the following day and suggested he contact him (Schipper) whenever it would be convenient for Mr. Boulder to meet at the Site to conduct tests.

278. Schipper did not hear from Mr. Boulder again until July 28, 1988, when Mr. Boulder informed Schipper that, sometime in June, Mr. Eldorado had requested him to provide Mr. Eldorado with a letter regarding interference. Mr. Boulder told Schipper he had complied with Mr. Eldorado's request, and provided him with a letter suggesting that Boulder's problems might be related to KQKS.

279. Mr. Boulder telephoned Schipper on December 27, 1988, and demanded that the capacitors which he and Cutforth had installed on December 22 be removed. According to Mr. Boulder, two of his customers, Joslins and Mullen Security, had complained of muffled audio and reduced frequency response after the capacitors had been installed. Although Cutforth believed

the capacitors would have resolved all of the problems at the Site, Mr. Boulder refused to permit any further measurements to be taken to check the performance of the repeaters either before or after the capacitors were removed. Similarly, although Cutforth concluded that the problems Boulder was experiencing were due to RF affecting the audio components of its repeaters, and he needed to locate the actual circuit that was detecting the music in order to determine the best method of eliminating the problem, Mr. Boulder denied Cutforth access to the equipment circuitry to conduct the necessary tests.

280. Cutforth could not understand how the capacitors could have generated static, and neither he nor Schipper believed they actually caused static or muffled audio. On the contrary, Schipper heard only normal communications taking place while monitoring his scanner after the capacitors were installed. Moreover, despite Mr. Boulder's statement that Mullen Security had complained of muffled audio and a decreased frequency response, when Schipper contacted Thomas Mullen on December 28, 1988, to inquire about the problem Mr. Boulder claimed he was experiencing, Mullen denied having complained to Mr. Boulder about any problems with his communications system. Cutforth and Schipper concluded, therefore, that Mr. Boulder's claims of static to Joslins and Mullen Security may have been fabricated in light of Mr. Eldorado's eviction suit.

281. Tillotson believed that Mr. Boulder's problems at the Site did not begin to arise until August 1988, after Mr. Eldorado, who was represented by the same counsel, filed a lawsuit to evict Western Cities from the Site. In this regard, Tillotson thought it was significant that Mr. Boulder's July 28, 1988, conversation with Schipper, in which he informed Schipper that he had provided a statement regarding interference to Mr. Eldorado in the previous month, occurred immediately prior to the filing of the Second Objection to Western Cities' July 1, 1988, amendment abandoning the MSA. Tillotson also was aware that Mr. Boulder had failed to appear on two separate occasions when he had previously agreed to meet Schipper at the Site to discuss the problems he was having. These facts led Tillotson to conclude that Mr. Boulder was not experiencing any interference problems at all.

282. Pyle's Execution of the License Application. Pyle received a copy of the FCC Letter from Tillotson on either December 27 or 28, 1988. Pyle characterized the language in the Letter stating that KQKS was the source of all destructive interference as "a crock." He interpreted the Letter as saying that if, in fact, there was any destructive interference, KQKS was the cause of that interference. However, based on the advice he had received from Dawson, Cutforth, Schipper and Tillotson, Pyle was "totally convinced" that KQKS was not causing any

"interference" as that term was defined by the Commission's rules, and he understood that Tillotson was going to address the Commission's finding the following day. Pyle had also been advised by Tillotson, through Schipper, that Western Cities was in compliance with the interference condition set forth in the FCC Letter. Accordingly, he executed Western Cities' License Application on January 3, 1989. Although Pyle was aware that Joslins was continuing to complain about interference, Pyle understood that the audio they were hearing did not interfere with their two-way communications. At no time either before or after January 3, 1989, did Schipper, Cutforth, Dawson, or Tillotson ever advise Pyle that the KQKS audio on the two-way repeaters operating from the Site was at a level which would render the communications unintelligible, or that KQKS' operation was decreasing the range of any of the facilities on the Site.

283. Tillotson's Interpretation of the FCC Letter. Upon receiving the FCC Letter on December 27, 1988, Tillotson did not believe the Commission's finding that KQKS was the source of all destructive interference had a valid legal basis. The FCC had never been to the Site, had never observed the phenomena, and had no engineering information as to what was going on at the Site. In Tillotson's view, the Commission had neither objective nor subjective evidence upon which to base its finding. Therefore, Tillotson believed the Commission's finding was conclusory. Moreover, although the FCC Letter referenced the Commission's newcomer policy, it contained no mention of to whom KQKS was causing interference.

284. According to Tillotson's interpretation of Section 2.1 of the Commission's Rules, in order for the KQKS audio to have constituted "harmful interference," it must have "seriously degrade[d], obstruct[ed], or repeatedly interrupt[ed]" the two-way communications on Boulder's repeaters. KQKS' engineering personnel studied the Site in November and December 1988, and found no evidence of interference. The only problem Cutforth and Schipper had observed was low-level KQKS audio in the background of certain Boulder frequencies which, in their opinion, was far too low to interfere with communications on Boulder's two-way system. Tillotson also believed that the Commission understood the problem to be as severe as Sebastian had described in the one, isolated instance where his agents had been unable to communicate during their apprehension of a shoplifter.

285. Because the Commission had a rule that defined "interference," and the FCC Letter specifically referenced the newcomer policy, Tillotson did not believe the FCC Letter directed KQKS to correct the "phenomena" at the Site but, rather, only "interference." Tillotson's belief was consistent with the understanding he had obtained from Dawson that it was impossible to

eliminate all background noise. Indeed, it never entered Tillotson's mind that the Commission would expect Western Cities to eliminate every trace of KQKS music. Therefore, based upon the text of the entire paragraph in which the finding that KQKS was the source of all destructive interference appeared, as well as the paragraph immediately following, Tillotson interpreted the FCC Letter as saying not that KQKS was causing interference, but as stating only that if KQKS was causing interference, it was responsible for curing that interference in accordance with the Commission's newcomer policy.

286. The Petition for Partial Reconsideration and Clarification. On December 29, 1988, six days *before* Western Cities filed its License Application, Tillotson filed a Petition for Partial Reconsideration and Clarification of the rulings made in the FCC Letter. In that Petition, Tillotson stated that Western Cities was not aware of any evidence submitted to the FCC that would support a finding that KQKS was the source of any destructive interference to any other facilities at the Site. The December 29 pleading pointed out that the interference complaints filed by Boulder and Eldorado did not identify the specific facilities allegedly receiving interference either by call letter or frequency, and none of the complaints were sufficiently documented to permit a determination to be made that destructive interference actually existed, or that KQKS was the source of any such interference. Western Cities further stated that there was an insufficient basis upon which the Commission could make a finding that destructive interference in fact existed at the Site, or that, if it did exist, KQKS was the source of the interference.

287. Based upon the text of the entire paragraph in which the finding that KQKS was the source of destructive interference appeared, and the paragraph immediately following, Western Cities stated in its Petition that it did not believe the Commission intended the FCC Letter to constitute a determination by the agency that a problem of destructive interference did, in fact, exist at the Site, and that KQKS was the source of such interference. Instead, Western Cities interpreted this portion of the Letter to mean that, to the extent there was destructive interference at the Site which arose after KQKS began operating from the Site, KQKS was presumed to be the source of that interference.

288. Western Cities requested the Commission to issue a clarification of the FCC Letter so that it would not be misinterpreted as a final adjudicatory finding by the Commission, based on substantial and credible evidence, that there was a problem of destructive interference at the Site and that KQKS was the source of such interference. Western Cities explained that such a clarification was necessary because the question of whether KQKS was causing interference to other users at the Site was being litigated by Western Cities and Eldorado in the Colorado courts.

Western Cities anticipated that Eldorado would attempt to use the FCC Letter in the civil proceeding as a final and conclusive FCC determination that KQKS was indeed causing destructive interference.

289. In the event the Commission intended the sentence in the FCC Letter stating that it found KQKS to be the source of destructive interference at the Site to constitute a formal agency "finding," Western Cities requested the Commission to state with specificity the evidentiary bases for its finding. Western Cities explained that the requested information was necessary in order for it to quickly and fully discharge its responsibility for correcting the interference which existed at the Site. Western Cities also noted that such information was necessary for the full Commission and, if necessary, a reviewing court to determine whether the finding regarding interference had a sufficient and rational basis.

290. Western Cities also requested clarification of the Commission's newcomer policy cited in the FCC Letter. Specifically, Western Cities questioned whether Boulder would be considered a newcomer because its facilities were relocated from one room in the transmitter building to another six months or more after KQKS began operating from the Site. Western Cities stated that equipment changes and modifications had been made to Boulder's relocated equipment. In light of these facts, Western Cities indicated its belief that Boulder should be considered a newcomer with respect to any equipment relocated, modified, or replaced subsequent to KQKS' arrival at the Site, unless there was credible evidence that the interference problems currently alleged to exist, existed prior to the relocation, modification or replacement of the equipment.

291. Western Cities Acted in Good Faith. At the time the FCC Letter was issued, the Commission had considered 32 pleadings and letters which had been filed with respect to Western Cities' April 30, 1987, MSA Application and amendments related thereto. Nineteen of those pleadings and letters were filed by Glaser on behalf of Boulder and Eldorado. In light of the numerous pleadings and letters which had been filed with the Commission and KQKS' requests for the Commission to send a representative to the Site to determine whether there was, in fact, "interference," it would defy common sense and logic to believe that Western Cities could somehow have intended to deceive the Commission with respect to whether it was in compliance with the interference condition. As Pyle stated:

Why would I do anything to mislead or misrepresent what I would put in [the License Application] when I had those two vultures [referring to Mr. Boulder and Mr. Eldorado] sitting on my shoulder up on that hill at all times?

292. The very existence of the FCC Letter demonstrated that, regardless of the filing of Western Cities' January 4, 1989, License Application and the representations contained therein, at least as of December 27, 1988, the Commission was fully aware of the complaints of interference at the Site. Further, by December 29, 1988, when Western Cities' Petition for Partial Reconsideration and Clarification was filed, the Commission was completely cognizant of Western Cities' factual and legal position with respect to the FCC Letter and the basis for that position. Therefore, it is difficult to understand how Western Cities could have intended to deceive the Commission by advancing and maintaining its position regarding a matter of record before the Commission.

293. Moreover, the fact Western Cities disagreed with the Commission's determination in the FCC Letter and maintained its position throughout this proceeding in no way indicates that Western Cities did not act in good faith at the time it answered Section I, Item 3, of its License Application. This is especially true in light of the fact Western Cities' position was based upon actual observations of the Site and engineering data which the Commission did not have available to it at the time the FCC Letter was issued. Consequently, because Western Cities did not intend to deceive the Commission with respect to its compliance with the interference condition, and its position concerning the matters addressed in the FCC Letter had a good faith basis, Issue (c) must be resolved in Western Cities' favor.

Issue (d) -- Real Party In Interest Issue

294. Issue (d), as modified, was specified to determine whether Rick Phalen was the real party in interest in a construction permit application filed by his daughter, Shawn Phalen. This issue, too, must be resolved in favor of Western Cities. In *Astroline Communications Co., Ltd., v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988), the court, quoting *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974), stated: "The Commission's real-party-in-interest inquiry focuses on whether a third person 'has an ownership interest, or will be in a position to actually or potentially control the operations of the station.'" In determining whether a third party will be in a position to control the station's operation, the court has recognized "that one of the most powerful and effective methods of control of any business . . . is the control of its finances." *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937). In determining whether a third party financier will

control the station, the Commission has also considered the relative broadcast experience of the putative applicant and the financier. *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5606 n.20 (1991).

295. However, where the third party who is providing the financing has a familial relationship to the applicant, the Review Board has stated:

Parties seeking [a real party in interest] issue where family members are involved . . . bear a heavy burden since the Commission recognizes that even independent family relationships may have attributes such as financial ties which in a non-family relationship would be persuasive indicia of real party status.

Magdalene Gunden Partnership, 2 FCC Rcd 5513, 5516 (Rev. Bd. 1987); *see also Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 651 (1983). The fact that a father lends funds to his son to finance his application, for example, does not necessarily warrant a finding that the father is the real party in interest in his son's application. *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435-36 (Rev. Bd. 1983). The Commission, however, will examine familial relationships where the independence of a family member is called into question. *Arnold L. Chase*, 5 FCC Rcd 1642, 1644 (1990).

296. In the instant case it is clear that Rick Phalen, Shawn Phalen's father as well as her financier, had much more broadcast experience than his daughter. Indeed, Shawn was only 19 years of age when she agreed, at the suggestion of her father's communications counsel, to file an application to construct a new FM broadcast station at Montecito. Moreover, it is clear that in pursuing her application she utilized her father's legal counsel, corporate counsel, and engineer. It is also clear that Shawn was totally dependent on her father for the financing of her application. Under these circumstances, absent the familial relationship, it could be argued that Rick was a real party in interest in Shawn's application.

297. The findings establish, however, that Rick limited his involvement in Shawn's application. Prior to the filing of Shawn's application, his participation was limited to the preparation of a lease for her proposed transmitter site and assistance in preparing a budget for her proposal. Otherwise, he left matters concerning the prosecution of Shawn's application to her. His involvement in the preparation of the lease, moreover, appears to have been a consequence of the fact that Shawn was convalescing from serious injuries sustained in an automobile

accident. When Shawn was well enough, the findings show, she resumed taking responsibility for the lease arrangements and in fact altered some of its terms.

298. Rick's limited involvement in Shawn's application, prior to its filing, under the extraordinary circumstances present here, does not support a conclusion that Rick was a real party in interest in his daughter's application. In addition, the fact that Rick told his daughter that if the station did not generate enough income to meet its expenses, including payments on its loan agreement, he could cut off funds, does not indicate that Rick would control the station any more than would any other lender that took steps to foreclose on a loan if payments were not made.

299. Moreover, the fact that the bills from Shawn's attorney and engineer were sent for payment to Shawn in care of Rick at Rick's post office box, does not mean that he was in a position to, or wanted to, control his daughter's application. The bills were paid from an account in Shawn's name established to pay the cost of preparing and prosecuting her application. The checks were signed by either Shawn or, on occasion when Shawn was not available, her mother.

300. Further, although Rick's acquisition of Station KQKS, following the filing of Shawn's application, was not reported in the Montecito proceeding until the matter was raised at Shawn's deposition, the failure to report that acquisition was not intentional on the part of either Shawn or Rick. The evidence is clear that the failure to report was solely due to counsel's not concentrating on the fact that such a matter had to be reported to the Commission. Counsel for Shawn and Rick is a highly experienced communications attorney. In order to believe that the failure to amend Shawn's application to reflect Rick's acquisition was intentional, it would be necessary to believe that counsel entered into a conspiracy with his clients to mislead the Commission and the other parties to the Montecito proceeding. This is ludicrous on its face since the acquisition was an open and public matter of Commission record. Indeed, the KQKS assignment application reported Rick and Shawn's relationship and Shawn's pending Montecito application.

301. Once Shawn filed her application for the Montecito facility, she made the decisions concerning that application. While Tillotson provided Rick with copies of his correspondence with Shawn relating to things such as the financing of Shawn's application and the real party in interest issue, he did not provide Rick with copies of other correspondence that did not directly concern him. In each instance, there was evidence to support a conclusion that Rick was being sent copies for reasons unrelated to control of either Shawn's application or of her station in Montecito, should she be the successful applicant in that proceeding.

302. Similarly, Rick's involvement in the aborted settlement of the Montecito case does not establish that he was using his daughter to gain control of the Montecito frequency for himself. Rick did set a condition to his willingness to finance Shawn's share of the settlement costs, namely, that Shawn first meet with Finkelstein to determine whether he was someone with whom she would be comfortable doing business. This condition, however, was consistent with his role as financier of Shawn's application in that he wanted to protect his investment. In any case, the record reflects that Rick left to Shawn the ultimate decision as to whether or not the settlement would go forward.

303. Significantly, the merger of the Spirit and Shawn Phalen applications contemplated that Spirit would control the merged entity. Logically, Rick's purported interest in obtaining control of the Montecito facility is belied by a settlement whereby Spirit would have had control of the merged entity. Furthermore, although it appears that Rick did unilaterally alter a condition of the settlement by insisting that 10 percent rather than 15 percent of in the merged applicant's stock be spun-off to a sales manager, the idea of a spin-off had already been agreed to by Shawn. The only variation was in the percentage to be offered. In any case, the evidence establishes that, after making the 10 percent proposal to Finkelstein, Rick presented the idea to Shawn who ratified it.

304. The merger between Shawn and Spirit appears to have gone off-track not only because Shawn decided that she did not want to do business with Finkelstein, but also because of a misunderstanding of Shawn's intent that she and Spirit each spin-off stock in the merged entity to an experienced sales manager. It appears that while Shawn, her father, and her lawyer were all operating under the assumption that the stock to be spun-off would be nonvoting, this assumption was never directly transmitted to Spirit. Spirit's contribution of 5 percent of its voting stock to a sales manager chosen by Shawn would have resulted in the loss of control by Spirit, whose stock interest would have declined from 51 to 46 percent.

305. Finally, and perhaps most compellingly, the facts here are completely consistent with a father seeking to establish his daughter in business. At the time Tillotson solicited Shawn to file an application for Montecito, Rick had just received \$7 million from the sale of Western-I. Tillotson did not contact Rick about the Montecito opportunity because he presumed that Rick was not interested in an FM station in a small market. Rick's interest was with major market radio stations. It was with those stations that Rick had made his money. Consequently, Tillotson solicited Rick's daughter, not Rick, to file an application for Montecito. The evidence is that Rick had no personal interest in operating a radio station in Montecito, and that his interest was

in establishing his daughter Shawn in business. Rick's interest, since his sale of Western-I, was in being an author, and he had written two books and had two others in progress.

306. The conclusion that Rick's interest was in establishing his daughter in business, and not in operating the Montecito station himself, was supported by his activities with regard to the Grover City station acquired by his other daughter, Kathleen. The record establishes that, although he did give advice when asked, Rick did not become involved in the day-to-day operational decisions of the station. In fact, Rick left the operation of the station in the hands of his daughter, Kathleen, and the station's manager, Bayliss.

307. As a final matter, even if it were concluded that Rick was a real party in interest in Shawn's application, such a conclusion would not require the disqualification of Western Cities in this proceeding. *See Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1700 (1992), where the Commission held that the Board had "not sufficiently taken into account the distinction between finding a proposal unreliable for comparative purposes and finding that an applicant's proposal reflects disqualifying misconduct." In this connection, the Commission held that, in order for there to be disqualifying misconduct, there had to be findings "that specific statements of material fact were deliberate misrepresentations or that [the applicant] concealed specific information." *Id.* Here, there was no evidence of misrepresentation or concealment by Rick Phalen.

JOINT REQUESTS FOR APPROVAL OF AGREEMENTS

308. Merger Agreement. In their Joint Request for Approval of Merger Agreement ("Joint Request-I"), Western Cities, Bustos, LBC, and St. Vrain seek approval of a Merger Agreement, as twice amended, which has been entered into by those applicants. Pursuant to the amended Merger Agreement, the Bustos, LBC, and St. Vrain applications would be dismissed in exchange for nonvoting Class C Preferred shares of Western Cities stock. LBC would be issued 12,500 such shares, constituting 13.75 percent of Western Cities' outstanding stock upon effectuation of the merger, Bustos would receive 9,000 shares, constituting 9.90 percent of the outstanding stock, and St. Vrain would receive 3,840 shares, constituting 4.22 percent of the outstanding stock. Joint Request-I also seeks the dismissal of the above captioned application of Western Cities for minor changes in its facilities, and a grant of the above captioned application of Western Cities for renewal of license for Station KQKS(FM). In addition, Joint Request-I states that Western Cities would attempt to effectuate a sale of Station KQKS(FM). The Bureau supports a grant of Joint-Request-I and the approval of the amended Merger Agreement.

309. Joint Request-I will be granted and the amended Merger Agreement approved. A review of Joint Request-I, including the certifications of the applicants' respective principals, shows that the applicants have complied with the requirements of Section 73.3523(b) of the Commission's Rules. Specifically, each applicant has certified that it did not file its application for the purpose of entering into or carrying out a settlement agreement, and that no consideration other than that reflected in the amended Merger Agreement has been promised or paid for the dismissal of its application. Further, the proposed merger appears to be *bona fide*. After considering the time and resources expended by the applicants in this proceeding and the uncertainty as to what the ultimate sale and disposition of Western Cities will bring to the respective applicants, the merger appears to be "a consensual allocation of economic risks and rewards among the merging parties which presumably reflects the assets brought to the joint undertaking by the various participants." *Amendment of Section 73.3525 of the Commission's Rules*, 6 FCC Rcd 2901, 2902 (1991).

310. Moreover, approval of the amended Merger Agreement will serve the public interest. Suffice it to say, this proceeding commenced in late 1990. Given the reinstatement of the St. Vrain application and the uncertainties surrounding the Commission's reevaluation of the comparative criteria, there is a very strong likelihood that, absent a settlement, the litigation of this case will go on for many, many more years. Resolution of this proceeding at this juncture will, therefore, eliminate the need for further litigation and the expenditure of the time and resources of the Commission and the applicants. *See, e.g., Longview Cable TV Company, Inc. v. Southwestern Electric Power Company*, 5 FCC Rcd 686 (1990); *Warner Amex Cable Communications, Inc. v. Southwestern Electric Power Company*, 5 FCC Rcd 578 (1990).

311. Settlement Agreement. In their Joint Request for Approval of Agreement ("Joint Request-II"), Eldorado and Western Cities seek approval of a Settlement Agreement which has been entered into by those parties. Pursuant to the Settlement Agreement, Eldorado will withdraw as a petitioner to deny Western Cities' 1989 renewal application. In return, Eldorado will receive 1,850 shares of Western Cities' Class C Preferred stock, which has a value of \$100 per share upon the liquidation of Western Cities, and which constitutes 2.04 percent of Western Cities' outstanding stock. Western Cities will also pay \$40,000 in cash to Eldorado in return for Eldorado's dismissal of a lawsuit against Western Cities pending in the Colorado courts. The Settlement Agreement also provides for the withdrawal of two pleadings filed by Eldorado with respect to Joint Request-I. According to Eldorado and Western Cities, the Settlement Agreement will resolve all of the pending disputes between those two parties. The Bureau supports a grant of Joint Request-II and the approval of the Settlement Agreement.

312. Joint Request-II will be granted and the Settlement Agreement approved. A review of Joint Request-II, including the certifications of the respective principals of Western Cities and Eldorado, shows that those parties have complied with the requirements of Section 73.3588(a) of the Commission's Rules. Specifically, principals of Western Cities and Eldorado have certified that Eldorado will not receive consideration in excess of its legitimate and prudent expenses, that no consideration other than that reflected in the Settlement Agreement has been promised or paid for Eldorado's withdrawal as a petitioner to deny, the exact nature and amount of the promised consideration has been disclosed, and Eldorado has submitted an itemized accounting of its reimbursable expenses. In this regard, the parties have established that Eldorado's expenses exceed the amount of consideration to be paid by Western Cities. *See Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780, 4785-86 (1989). Finally, for the reasons recited above in connection with the approval of the Merger Agreement, approval of the Settlement Agreement will serve the public interest.

ULTIMATE CONCLUSION

313. With the resolution of Issues (c) and (d) in Western Cities' favor, and the approval of the Merger Agreement and the Settlement Agreement, there remains no impediment to a grant of Western Cities' renewal application. Consequently, it is ultimately concluded that the public interest, convenience and necessity will be served by a grant of the application of Western Cities for renewal of license of Station KQKS(FM), Longmont, Colorado, and that application will be granted.

ORDERING CLAUSES¹⁰

Accordingly, IT IS ORDERED that the Joint Request for Approval of Merger Agreement, filed by Western Cities, Bustos, LBC, and St. Vrain on September 6, 1996, IS GRANTED, and the Merger Agreement, as amended, IS APPROVED.

IT IS FURTHER ORDERED that the Joint Request for Approval of Agreement filed by Eldorado and Western Cities on October 8, 1996, IS GRANTED, and the Settlement Agreement IS APPROVED.

¹⁰ As indicated in notes 1 and 3, *supra*, St. Vrain's application is now before the Mass Media Bureau rather than the Presiding Judge. Therefore, the following Ordering Clauses are contingent upon the grant of the Joint Request for Approval of Merger Agreement and the grant of the Joint Request for Approval of Agreement which are presently pending before the Bureau.

IT IS FURTHER ORDERED that the Opposition to "Joint Request for Approval of Merger Agreement" filed by Eldorado on September 18, 1996, and the Supplement to Opposition filed by Eldorado on September 23, 1996, ARE DISMISSED.

IT IS FURTHER ORDERED that the application of Amador S. Bustos for a construction permit for a new FM broadcast station on Channel 282C1 at Longmont, Colorado (File No. BPH-900228MB), IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Longmont Broadcasting Corporation for a construction permit for a new FM broadcast station on Channel 282C1 at Longmont, Colorado (File No. BPH-900216MA), IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Western Cities Broadcasting, Inc., for a license to cover minor changes to Station KQKS(FM), Longmont, Colorado (File No. BLH-890104KC), IS DISMISSED with prejudice.

IT IS FURTHER 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 Western Cities Broadcasting, Inc., for renewal of license of Station KQKS(FM) on Channel 282C1 at Longmont, Colorado (File No. BRH-891201XU), IS GRANTED.¹¹

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

¹¹ 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) of the Rules.