

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re Application of)	
)	
PHILIP J. PLANK,)	
Assignor)	
)	
And)	File No. BALH-20051208ADX
)	Facility ID No. 52469
LAZER BROADCASTING)	
CORPORATION, Assignee)	
)	
For Assignment of License,)	
Station KSSB, Calipatria, California)	

To: The Secretary
Attention: Chief, Audio Division

OPPOSITION TO PETITION TO DENY

Lazer Broadcasting Corporation (“Lazer”), assignee in the captioned application, hereby opposes the petition to deny (the “Petition”) filed against that application by Broadcast Company of the Americas, LLC (“BCA”) on January 13, 2006. The Petition should be rejected and the application granted because (1) BCA does not have standing, (2) BCA does not state a valid basis for the relief it seeks, and (3) the identical arguments—in the form of virtually the same Petition--were recently rejected by the Commission in another proceeding.

BCA Lacks Standing

Through its assignment application, Lazer is seeking authority to acquire Station KSSB, a Class A FM station in Calipatria, California. BCA’s Petition argues facts concerning an entirely different matter—an ongoing Section 325(c) proceeding now before the International Bureau. There is no connection between these two matters.

Indeed, BCA cannot and does not present any specific allegations of fact regarding the KSSB assignment application. Its standing claim is based only on the assertion that “Lazer’s misconduct has directly and adversely affected BCA,” making it an “aggrieved party” with standing to file the Petition. Petition, n. 1.

This statement of interest is insufficient to confer standing. Section 309(d)(1) of the Communications Act, 47 U.S.C. Sec. 309(d)(1), allows only “parties in interest” to file petitions to deny. To qualify as a party in interest, BCA must make “specific allegations of fact to demonstrate that grant of the challenged application would cause the petitioner to suffer a direct injury.” *Alaska Native Wireless, L.L.C.*, 18 FCC Rcd 11640, 11644 (2003). BCA also must also “establish a causal link between the claimed injury and the challenged action” and show that denying the assignment application would likely prevent or redress the alleged harm. *Id.*

The Petition contains no allegation that grant of the KSSB assignment application would cause a direct injury to BCA. BCA, which is not even an FCC licensee (Petition, p. 1), does not show a causal link between wrongs it allegedly suffered in the Section 325(c) proceeding and the challenged KSSB assignment. Nor does BCA even attempt to demonstrate how grant of the KSSB assignment application would prevent or redress the harm it alleges. Having failed to meet a single test, BCA does not have standing to file a petition to deny. For this reason the Petition should be rejected out of hand.

The Petition Does Not State a Basis for Relief

Background. On May 16, 2005, Lazer, Citicasters Licenses, L.P. (“Citicasters”) and Emmis Communications Corporation (“Emmis” and together with Lazer and Citicasters, “Joint Petitioners”) filed a petition to deny an application by Quetzal

Bilingual Communications, Inc. (“Quetzal”) for authority under Section 325(c) of the Communications Act to deliver U.S.-originated programming to Station XHBCE-FM, Tecate, B.C., Mexico. Petition, Ex. A. The petition to deny was supported by engineering showings which demonstrated that XHBCE-FM and three Mexican AM stations being used by Quetzal for its cross-border operations were using illegal facilities at variance with the internationally notified parameters for those stations. Using GPS equipment, a special radio receiver and an electronic camera, Joint Petitioners’ engineer observed these stations from the air. His report showed that the actual as opposed to the U.S.-notified facilities were, in various combinations, operating from unauthorized (and more advantageous) locations, at the wrong heights and with unauthorized antenna systems. Petition, Ex. A, pp. 3-8 & Ex. 3. These showings were challenged by Quetzal in an opposition pleading filed June 15, 2005. Petition, Ex. C. Also on June 15, 2005, Joint Petitioners (without Citicasters, which did not participate further) filed a petition to deny a follow-up Section 325(c) application by BCA, which had by then entered into an LMA with Quetzal. Petition, Ex. B. The BCA Section 325(c) application sought interconnection rights with XHBCE-FM operating both as Class C1 station from Tecate, B.C., and as a Class B station at Matamoros Jaramillo, B.C., Mexico.

In opposing the Quetzal and BCA applications, Joint Petitioners demonstrated through topographic maps and the observations mentioned above that XHBCE-FM’s Class B facilities were located atop Cerro Grande, a site 2.5 kilometers distant from the authorized site and some 520 meters (1706 feet) higher. Petition, Ex. B, p. 6-7; Petition Ex. E, pp. 7-8. This site was neither approved by the Mexican government nor notified to the U.S. *See* Ex. E, pp. 7-8. BCA’s engineer admitted the station was located atop Cerro

Grade. Petition Ex. C, Exhibit 1 (engineering statement), p. 10. Joint Petitioners also demonstrated through the submission of technical showings, including materials from Electronics Research, Inc. (“ERI”), a leading manufacturer of FM antennas, that the pattern produced by the directional antenna installed at Cerro Bola for XHBCE-FM’s Class C1 facility is, in terms of U.S. coverage, different from the directional pattern notified to U.S. *See, e.g.*, Petition, Ex. E, Exhibit 1 (engineering statement), Ex.E-4 & E-5; & Petition, Ex. G. Specifically, Joint Petitioners, using ERI studies, showed that XHBCE-FM’s ERP in the direction of KXRS in Hemet, California, would be *seven times* greater than possible if XHBCE-FM used the antenna pattern notified to the FCC. Petition, Ex. E, p. 5 and Exhibit 1, p. 5.

Misrepresentation. While BCA may disagree with Lazer’s engineering showings, such a disagreement does not constitute grounds for the misrepresentation charges in the Petition. Lazer stands by the evidence it presented in the pending Section 325(c) proceeding and believes it will prevail. Lazer’s KXRS operates on the same frequency as the illegally-constructed XHBCE-FM facilities and has suffered serious interference from that station throughout Riverside County, California. Petition, Ex. A, Exhibit 1 (declaration of Armando Gutierrez).¹ BCA wants to use XHBCE-FM to broadcast its U.S.-generated programming throughout Southern California in spite of the fact its Mexican partner is not operating with authorized facilities. The petitions and other materials filed by Lazer have done nothing more than blow the whistle on this

¹ BCA, without any support, alleges that Lazer’s actions in the Section 325(c) proceeding are motivated by sour grapes because Lazer was outbid by BCA for program rights on XHBCE-FM. Attached as Exhibit 1 is a copy of a declaration of Lazer’s president, Alfredo Plascencia, in which Mr. Plascencia denies that Lazer ever bid against BCA or anyone else for program rights on XHBCE-FM. Petition, pp. 2 & 7. As Mr. Plascencia states, Lazer’s only interest in that proceeding is to protect KXRS, Hemet, California, from interference.

illegal plan. As shown above, the pleadings filed by Lazer in the Section 325(c) proceeding are supported by expert engineering showings. Further, those submissions were presented in good faith in a legitimate effort to protect a Lazer station from interference. The rules contemplate the filing of such pleadings. Moreover, while this is a matter for the International Bureau to decide, the truth of Lazer's allegations is borne out by the supporting materials it presented.

This being said, the merits of the parties' arguments in the Section 325(c) proceeding, including the veracity of the pleadings and materials submitted, will be decided by the International Bureau in due course. An adjudication of the issues presented in that case is neither necessary nor appropriate in the context of the pending KSSB assignment application. The only BCA allegation, if any, that the Media Bureau may wish to resolve in this context is whether Lazer, as a Joint Petitioner in the Section 325(c) proceeding, abused FCC processes in opposing BCA's Section 325(c) applications.

Abuse of Process. In its *Policy Regarding Character Qualifications in Broadcast Licensing ("Character Qualifications")*, 102 FCC 2d 1179, 1211 (1986), the Commission set forth five criteria for determining if an abuse of process has occurred through the filing of "strike" pleadings of the sort BCA alleges Joint Petitioners filed in the Section 325(c) proceeding. Those criteria are (1) the existence of statements by petitioner's principals admitting to an obstructive purpose; (2) the withholding of information relevant to disposition of the issues raised; (3) the absence of any reasonable basis for the allegations; (4) economic motivation indicating a delaying purpose; and (5) other conduct by the petitioner. *Radio Carrollton*, 69 FCC 2d 1138, 1150 (1978)

(subsequent history omitted). BCA has not made any of these showings. BCA has no evidence of statements by Lazer principals admitting to an obstructive purpose. BCA has no evidence of a withholding of information. Contrary to the audacious claims in the Petition, the allegations made by Joint Petitioners *do* have a reasonable basis; indeed, as shown above, they are supported by expert engineering evidence and are true. Further, Lazer has no economic interest that is served by delay; its stated purpose is to protect KXRS from interference from the illegally-constructed Mexican facilities that BCA seeks to use. Protecting that interest constitutes a legitimate use of FCC processes.² There no evidence that Lazer has engaged in conduct that contradicts its stated goals. In short, BCA has no case at all against Lazer for abuse of process. With the merits of the parties' pleadings in the Section 325(c) proceeding still undecided by the International Bureau, there is nothing else for the Media Bureau to decide in this case. Thus, the Petition has no merit and should be promptly denied.

The Commission Already Has Denied BCA's Allegations

BCA filed a petition to deny against Emmis, Lazer's Joint Petitioner, on September 29, 2005, that is virtually identical to the Petition³ Except for the portions of the pleading identifying the applicants and some other minor edits, the text of the petition against Emmis, and all of the attachments to it, were simply copied and presented

² BCA complains that Joint Petitioners abused FCC processes by filing letters opposing BCA's request for an STA to interconnect with XHBCE-FM while BCA's application for permanent authority was pending. Petition, pp. 7-9. BCA ignores the fact that these filings were responsive to four separate letters filed by BCA over two months to bolster its STA request and, at the same time, add more evidence pertinent to its flagging Section 325(c) application. Significantly, two of BCA's letters (on August 5 and September 9) were filed after the pleading cycle for permanent authority closed on July 29. Petition, Ex. H, para. 2. BCA should not be heard to complain of delays it brought on itself.

³ That petition was filed against applications by Emmis Television License, LLC for authorizations to acquire nine television stations (File Nos. BALCT-20050826AAB, *et al*).

again the Petition. For the convenience of the staff, a copy of BCA's September 29, 2005 petition against the Emmis assignment application, without the identical attachments, is attached hereto as Exhibit 2. The Commission denied the BCA petition, and granted all nine Emmis assignments, in a decision released November 29, 2005. *Emmis Television License ("Emmis Television"), LLC*, DA-05-3094. A copy of that decision is attached as Exhibit 3. As the Commission easily can do here with respect to Lazer, the decision in *Emmis Television* found that there was a reasonable basis for the allegations made by Joint Petitioners, and that they did not abuse FCC processes in the Section 325(c) proceeding. Indeed, the Commission points out that BCA admitted that XHBCE-FM's Class B facility is at the wrong site even while BCA was claiming the Joint Petitioners' evidence on this point is a misrepresentation. *Emmis Television* at 4. In any event, the Commission said the issues raised in that proceeding, including the veracity of the presentations, will be resolved by the International Bureau. That ruling should apply to Lazer as well.

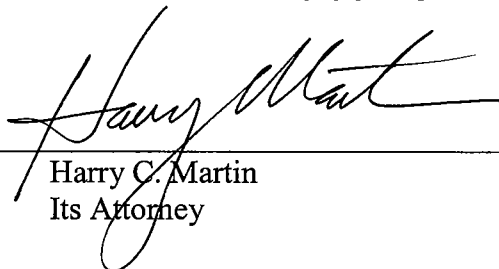
In sum, BCA has no standing and no case against Lazer. It is BCA, which now has filed frivolous cookie-cutter petition against an unrelated assignment application, that is guilty of an abuse of process. That Petition was filed even after BCA's identical petition, against Emmis, was summarily denied. The Commission should act promptly on the KSSB assignment application so as not to encourage the filing of similarly-misguided pleadings submitted solely for vindictive purposes.

WHEREFORE, These matters considered, it is respectfully requested that the Petition be dismissed or denied and that the captioned application be granted.

Respectfully submitted,

LAZER BROADCASTING CORPORATION

By

A handwritten signature in black ink, appearing to read "Harry C. Martin", is written over a horizontal line. The signature is fluid and cursive.

Harry C. Martin
Its Attorney

Fletcher, Heald & Hildreth PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0415

January 20, 2006

EXHIBIT 1

DECLARATION OF ALFREDO PLASCENCIA

Exhibit 2Declaration of Alfredo Plascencia

My name is Alfredo Plascencia. I am the president and 100 percent stockholder of Lazer Broadcasting Corporation ("Lazer"), licensee of Station KXRS, Hemet, California, as well as other California radio stations.

I have reviewed the Opposition to Petition to Deny filed with the FCC on June 30, 2005 by Broadcast Company of the Americas, LLC ("BCA"). On page 4 of that pleading, BCA says, in effect, that Lazer's motivation for filing a petition to deny against BCA is "sour grapes." Specifically, BCA states that "Lazer...was attempting to enter into a programming agreement whereby it could provide programming to XHBCE-FM," but "lost out" to BCA in a contest to win such programming rights. These statements are untrue.

In December 2004 I was contacted by Jaime Bonilla, who offered me a programming agreement with XHBCE-FM. The price quoted was \$100,000 per month plus expenses. I viewed this price as way too high and turned the offer down. Later, in early May, 2005 (just before I went to Europe on a vacation), Mr. Bonilla called me again, this time to offer me a programming deal on XESS, 620-AM, which he said was now reaching the Los Angeles area. I told Mr. Bonilla I would consider the proposal, but I never called him back. I have had no other discussions with anyone regarding programming deals on XHBCE-FM or other Mexican radio stations.

I hereby declare under penalty of perjury under the laws of the United States that the foregoing is based on my personal knowledge and belief and is true and correct.

Signed and dated this 27th day of August, 2005.



Alfredo Plascencia

EXHIBIT 2

BCA'S PETITION TO DENY EMMIS' ASSIGNMENT
APPLICATIONS,
SEPTEMBER 29, 2005
(ATTACHMENTS OMITTED)

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

In Re Applications for Consent to Assignment of Licenses)
)
)
From Emmis Television License, Inc. to:)
)
Journal Broadcast Corporation:)
KGUN, Tucson, AZ) BALCT-20050826AAB
WFTX, Cape Coral, FL) BALCT-20050826AAE
)
Indiana Broadcasting, LLC:)
WTHI-TV, Terre Haute, IN) BALCT-20050825AFC
)
LIN Wisconsin, LLC:)
WLUK-TV, Green Bay, WI) BALCT-20050825AFA
)
LIN of Alabama, LLC:)
WALA-TV, Mobile, AL) BALCT-20050825AEY
WBPG, Gulf Shores, AL) BALCT-20050825AEZ
)
LIN of Colorado, LLC:)
KREZ-TV, Durango, CO) BALCT-20050825AEB
)
LIN of New Mexico, LLC:)
KRQE, Albuquerque, NM) BALCT-20050825ABS
KBIM-TV, Roswell, NM) BALCT-20050825ADB

To: Office of the Secretary
Attn: Chief, Media Bureau

PETITION TO DENY

John M. Pelkey
Deborah J. Salons
Garvey Schubert Barer
1000 Potomac Street, N.W.
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Washington, D.C. 20007

Date: September 29, 2005

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Summary

Broadcast Company of the Americas, LLC, hereby petitions to deny the above-referenced assignment applications that have been filed by subsidiaries of Emmis Communications Corporation (“Emmis”) seeking Commission consent to the assignment of certain television licenses held by those subsidiaries. As is explained in the following Petition to Deny, Emmis has been engaged in a course of conduct that seeks to prevent the initiation of new service to the residents of the greater San Diego area through the submission of pleadings that not only contain numerous misrepresentations and evidence a lack of candor on the part of Emmis, but that also make it evident that Emmis has embarked upon a course of conduct that purposefully seeks to abuse the Commission processes to Emmis’s private advantage.

Applicable precedent clearly prescribes that a licensee that is of unfit character “has nothing to assign or transfer” and an assignment application filed by such a licensee must be denied. Accordingly, BCA respectfully requests that the above-referenced assignment applications be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In Re Applications for Consent to Assignment of Licenses)))	
From Emmis Television License, Inc. to:))	
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WBPB, Gulf Shores, AL)	BALCT-20050825AEZ
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KBIM-TV, Roswell, NM)	BALCT-20050825ADB
)	
To: Office of the Secretary		
Attn: Chief, Media Bureau		

PETITION TO DENY

Broadcast Company of the Americas, LLC (“BCA”), through counsel, hereby petitions to deny the above-referenced applications in which subsidiaries of Emmis Communications Corporation (“Emmis”) seek Commission consent to assign certain television station licenses to different proposed assignees. As will be shown below, Emmis is not of fit character to hold a Commission license inasmuch as it has engaged in a course of conduct of willful misrepresentation, lack of candor and abuse of the Commission’s processes that evidences

Emmis's unfitness to be a Commission licensee. Under established precedent, a licensee that is unqualified to hold its license "has nothing to assign or transfer" and an assignment application filed by such a licensee must be denied.¹

I. Background

A. BCA's Attempts to Provide Service to the Public.

BCA is a California limited liability company that seeks to provide service to the residents of the greater San Diego community by providing programming over Mexican stations pursuant to Section 325 authorizations received from the Commission. BCA received its initial Section 325 authorization, by which it provides programming over XEPRS(AM), in 2003. Since that time, it has been attempting to find additional programming outlets in the San Diego market on either side of the U.S. - Mexican border. Because BCA found itself competing with broadcast groups in the San Diego market that were either the licensee of, or had rights to program, upwards of a dozen stations in the market and because BCA holds the rights to broadcast the San Diego Padres games in the San Diego market, BCA required the additional outlets both to expand its ability to provide diverse programming and to help ensure that it could reach the entire market.

In order to procure such additional outlets, BCA negotiated programming arrangements so that it could supply programming over XEKTT(AM) and XHBCE-FM. Those programming arrangements provided that, initially, BCA would provide programming to Quetzal Bilingual Communications, Inc. ("Quetzal"), for use by Quetzal in programming XEKTT(AM) and XHBCE-FM. Those arrangements also provided, however, that BCA would eventually provide programming directly to those two stations in BCA's own right.

¹ *In re Application of Northland Television, Inc., For Renewal of License*, 42 Rad. Reg. 2d (P & F) 1107, at para.6 (1978) [hereinafter *Northland Television*].

In implementation of these programming agreements, Quetzal, which already held Section 325 authority to place programming over XEKT(AM), applied for authority to provide programming over the Class C1 facilities of XHBCE-FM. BCA filed three Section 325 applications of its own. The first sought Section 325 authority to place programming over XEKT(AM). The second sought authority to provide programming over the Class B facilities of XHBCE-FM, while the third BCA Section 325 application sought authority to place programming over the Class C1 facilities of XHBCE-FM. While these applications were pending, BCA supplied programming to Quetzal for use on XEKT(AM) and for use on the Class B facilities of XHBCE-FM, a facility being programmed by Quetzal pursuant to special temporary authority granted to Quetzal under Section 325.

B. Emmis's Use of Misrepresentations, Lack of Candor and Abuses of the Commission's Processes to Thwart the Provision of Service to the Public.

BCA's goal of providing new service to the residents of San Diego was stymied, however, by petitions to deny filed by Emmis and another entity known as Lazer Broadcasting Corporation ("Lazer").² Those petitions sought to deny the grant of the Section 325 applications filed by both Quetzal and BCA based upon allegations that the Mexican licensees of XEKT(AM), XHBCE-FM and other Mexican stations had constructed facilities that had not been coordinated with the United States.³ Despite its attempt to raise character issues concerning BCA, which is not the licensee of any Mexican station, based upon allegations concerning several Mexican stations, Emmis's Petition to Deny filed against BCA sought the denial only of the BCA applications filed with respect to XHBCE-FM. As regards that station, Emmis alleged

² As is explained in full above, Emmis's misconduct has directly and adversely affected BCA. It is thus an aggrieved party and has standing to file this Petition to Deny.

³ See *In re Applications of Quetzal Bilingual Communications, Inc.*, Petition to Deny, filed May 16, 2005 (for the convenience of the staff, attached hereto as Exhibit A); *In re Applications of Broadcasting Company of the Americas, LLC*, Petition to Deny, filed June 15, 2005 [hereinafter: *Emmis BCA Petition*] (for the convenience of the staff, attached hereto as Exhibit B).

that the XHBCE-FM Class B facilities were not constructed at the appropriate location. In alleged support of this contention, Emmis provided an engineering statement in which a consultant, who is not a registered professional engineer, purported to provide pictures of the XHBCE-FM Class B site. As regards the Class C1 XHBCE-FM facilities, Emmis initially claimed that the antenna of that facility was pointed such as to place its major lobe toward the northwest. Emmis further claimed that the Class C1 facilities were already operating and asserted, based upon a statement made by a salesperson for KXRS(FM), Hemet, California, that the Class C1 facilities were causing interference to KXRS(FM).

Curiously omitted from the Emmis submissions was anything approaching a demonstration of legitimate standing. Emmis merely claimed that its interest in the operation of XHBCE-FM was that of a U.S. station with a “stake in the integrity and reliability of station notifications under U.S. broadcast agreements with Mexico.”⁴ In fact, the truth is much more prosaic. Emmis is the licensee of KPWR(FM), Los Angeles, California. KPWR(FM) operates on 105.9 MHz, which is the frequency that is first adjacent to XHBCE-FM’s frequency of 105.7 MHz. As trade reports have made clear, Emmis’s primary interest with respect to the Quetzal and BCA applications was to make sure that XHBCE-FM would not cause interference to KPWR(FM).⁵ Emmis, however, is not entitled to any protection to KPWR(FM) not accorded to KPWR(FM) by the terms of the USA-Mexico FM Broadcasting Agreement (the “Treaty”). Emmis, however, has sought to abuse the Commission’s processes to obtain for itself a level of protection that is not afforded to it by the Treaty.

⁴ *Emmis BCA Petition, supra* note 2, at 2.

⁵ *See M STREET JOURNAL*, June 22, 2005, at p.3.

As if Emmis's misuse of the Commission's processes to attempt to obtain protection to which it is not entitled was not bad enough, Emmis further compounded its abuse of the Commission's processes through submitting pleadings rife with misrepresentations.

In response to the Petition to Deny filed by Emmis against the Quetzal Section 325 application, BCA's Chief Executive Officer chartered a helicopter and made a personal inspection of each of the transmitter sites that Emmis alleged was not operating in compliance with the terms of the coordination between the United States and Mexico. That inspection, the results of which are fully set forth in Quetzal's and BCA's Oppositions to Emmis's Petitions to Deny, clearly revealed that, not only were Emmis's assertions wrong, but Emmis must have known that they were wrong at the time it made those assertions to the Commission. For example, as has been noted above, Emmis claimed that the Class B facilities of XHBCE-FM were not constructed at the appointed location. Emmis even provided a picture of a vacant field and initially implied that it could not locate the Class B facilities. BCA's on-site inspection revealed, however, that the Class B facilities had been constructed only a few hundred feet from the authorized site, a not uncommon occurrence with Mexican stations. Disturbingly, Emmis must have known of the actual location of the Class B site inasmuch as its consultant had visited the authorized XHBCE-FM Class B site via helicopter and the helicopter pilot would have been required to have flown around the constructed XHBCE-FM facilities.⁶

Even after this misrepresentation was pointed out to the Commission, Emmis sought to mislead the Commission by continuing to maintain, in its Reply to BCA's Opposition, that the

⁶ See *In re Application of Quetzal Bilingual Communications, Inc.*, Opposition to Petition to Deny, filed June 15, 2005 (for the convenience of the staff, attached hereto as Exhibit C); *In re Application of Broadcast Company of the Americas, LLC*, Opposition to Petition to Deny, filed June 30, 2005 (for the convenience of the staff, attached hereto as Exhibit D).

Class B facilities were constructed in the wrong place.⁷ This time, however, no pictures of the constructed Class B facilities were provided. Instead, Emmis played games with the Commission by purposely attempting to mislead the Commission into thinking that the Class B facilities must have been constructed at the wrong location because the Mexican name for the location is different than the name used by the Commission.

In a like vein, Emmis claimed in its Petitions to Deny that XHBCE-FM had commenced operations from its Class C1 facilities. BCA's on-site inspection of the Class C1 facilities revealed, however, that although the transmitter and antenna for the Class C1 facilities had been installed (as was perfectly permissible under the terms of the station's Mexican authorization), the station was incapable of initiating programming from those Class C1 facilities due to the fact that the audio processing equipment and other equipment necessary for the reception of signals from the XHBCE-FM studios had not yet been installed. In fact, when it became necessary for the station to initiate programming from those Class C1 facilities several weeks after Emmis filed its Petitions to Deny, several days of work were required to install the additional equipment necessary to make the Class C1 facilities operational.

Similarly, Emmis sought to mislead the Commission by misrepresenting the orientation of the antenna used by the XHBCE-FM Class C1 facilities. Emmis's Petition to Deny against the BCA application claimed that the XHBCE-FM antenna was "oriented with the major lobe towards the northwest."⁸ In fact, pictures provided by Emmis as part of its Petition to Deny the Quetzal application clearly disclosed that the XHBCE-FM antenna was properly mounted towards the west.

⁷ See *In re Applications of Broadcast Company of the Americas, LLC*, Reply to BCA Opposition, filed July 29, 2005 (for the convenience of the Commission staff, attached hereto as Exhibit E).

⁸ See *Emmis BCA Petition*, *supra* note 2, Engineering Statement of Joel Saxberg at p.2.

Not content with misstating the orientation of the Class C1 antenna, Emmis also attempted to mislead the Commission into believing that the pattern of the antenna provided “essentially full-power radiation toward KXRS.”⁹ The very engineering study provided by Emmis as part of its Petition to Deny against BCA actually demonstrated however, that this statement was simply untrue.

Because of the delays in the processing of the BCA Section 325 applications brought about by Emmis’s abusive Petitions to Deny and because the Mexican government had ordered XHBCE-FM to commence operation using its Class C1 facilities, BCA was forced, at substantial expense, to construct studios in Tijuana and to rent housing on the Mexican side of the border so that nearly all of BCA’s programming could be produced in Mexico. One program that BCA is contractually obligated to broadcast, “El Cucuy Por La Manana,” is produced in Los Angeles, however, with the result that Section 325 authority is required if that program is to be aired over a Mexican station. BCA thus requested special temporary authority to permit it to place that single program over the XHBCE-FM Class C1 facilities. Once again, Emmis opposed the STA request, with the result that the Class C1 facilities of XHBCE-FM are used for all of the broadcast day other than the morning drive time slot when “El Cucuy Por La Manana” is being broadcast. For those morning drive hours, the station, operating with the forbearance of the Mexican government, must revert to the use of its Class B facilities inasmuch as the Commission has not yet granted Section 325 authority for the use of the Class C1 facilities. That STA request was filed on July 1, 2005. Through a concerted practice of persistent delay, Emmis has prevented any action on that STA request – to the direct detriment of the residents of San Diego who are forced to rely upon the signal achieved by the inferior Class B XHBCE-FM facilities.

Indeed, delay has been a by-word of all of Emmis’s submissions with respect to BCA’s

⁹ *Emmis BCA Petition, supra* note 2, at 8.

applications. Its Reply to BCA's Opposition to the Emmis Petition to Deny was filed weeks after the normal due date for the submission of a reply. When BCA filed a declaration from the designer of the antenna in use at the Class C1 facilities to demonstrate why Emmis's consultant could not observe the parasitic elements on the XHBCE-FM Class C1 antenna,¹⁰ Emmis waited more than a month before it submitted a purported rebuttal to that Declaration.¹¹ Then compounding the delay, Emmis, through counsel, filed yet another letter on September 15, 2005.¹² That September 15 letter, which contained no material that could not have been included in Emmis's much-delayed Reply to BCA's Opposition, actually acted as yet further evidence of Emmis's willingness to attempt to mislead the Commission. That September 15 letter claimed that the Class C1 antenna was in violation of the terms of the coordination between the United States and Mexican governments because the as-built facilities extended beyond the notified pattern in directions other than the directions of limitation. In point of fact, however, whereas the September 15 letter claimed that the Treaty requires that the as-built facilities of a station must fall within the envelope of the pattern as notified by the Mexican SCT to the FCC, the Treaty actually imposes no such obligation other than in the directions of limitation. Thus, not only did the Emmis submission have the effect of further delaying service to the public, but it also sought to mislead the Commission.

This pattern of misrepresentation, lack of candor and persistent delay, all directed at helping to provide KPWR(FM) with a level of protection to which it is not entitled, is played out against a backdrop of the refusal by Emmis to cooperate with BCA to take those steps necessary to ensure that the XHBCE-FM facilities are operating in accordance with the terms of the station

¹⁰ See Letter of August 5, 2005 from counsel for BCA to the Commission (for the convenience of the Commission staff, attached hereto as Exhibit F).

¹¹ See Letter of September 7, 2005, from counsel for Emmis and Lazer to the Commission (for the convenience of the Commission staff, attached hereto as Exhibit G).

¹² For the convenience of the staff, a copy of this September 15, 2005 letter is attached hereto as Exhibit H.

authorization and the coordination between the U.S. and Mexican governments. BCA offered on several occasions to work with Emmis's engineers so that Emmis could be assured that the XHBCE-FM facilities were operating properly. Emmis, however, has steadfastly refused BCA's offer. The conclusion is inescapable that Emmis is not interested in ensuring that the XHBCE-FM facilities are operating in accordance with the station authorization and the coordination but, instead, is only interested in delaying action on BCA's Section 325 applications as long as possible. Emmis's submissions constitute an abuse of process, an abuse that the Commission cannot tolerate and that evidence Emmis's lack of qualifications to be a Commission licensee. As a result, the Emmis assignment applications must be denied.

II. Applicable Precedent Mandates the Dismissal of the Emmis Assignment Applications.

It is undisputed that a party may not hold a Commission license unless it is of fit character. The Communications Act itself explicitly states that the Commission shall consider character as a qualification to hold a license: "All applications for station licenses or modifications or renewal thereof, shall set forth such facts as the Commission by regulation may prescribe as to the . . . character . . . and other qualifications of the applicant to operate the station . . ." 47 U.S.C. §308(b). Of particular relevance to the present case is the rule of law, repeatedly reaffirmed by the Commission, that an assignment application cannot be granted if the assignor does not possess the character qualifications to be a Commission licensee. As the Commission itself has stated, "The Commission has repeatedly held that a licensee or permittee has nothing to assign or transfer unless and until he has established his own qualifications, and assignment and transfer applications are dismissed as moot upon a finding that the selling party lacks such qualifications."¹³

¹³ *Northland Television, Inc.*, *supra* note 1, at para. 6.

The D.C. Court of Appeals has acknowledged and affirmed this guiding principle for the processing of assignment applications. Thus, in *Jefferson Radio Co. Inc. v. FCC*, the court stated: “It is the recognized policy of the Commission that assignment of broadcast authorizations will not be considered until the Commission has determined that the assignor has not forfeited the authorization.”¹⁴ The *Jefferson* policy is “based on the premise that permitting a licensee whose qualifications are in question to assign the station freely would undermine the deterrent impact of the renewal process on future misconduct by the licensee in question and others by permitting the licensee to be fully compensated for the license despite the alleged wrongdoing.”¹⁵

Crucial to a determination of a proposed assignor’s character is an assessment of whether the proposed assignor has engaged in FCC-related misconduct. The *1986 Character Qualifications Policy Statement* defines FCC related misconduct as any “activity which violates the Communications Act, or a specific Commission rule or policy”¹⁶ and explains that, as a general matter, “any violations of the Communications Act, Commission rules or Commission policies can be said to have a potential bearing on character qualification.”¹⁷

Under the Communications Act, all licensees are required to tell the truth. The Act states that the Commission may revoke any station license or construction permit for false statements knowingly made either in the application or any statement of fact.¹⁸ The Commission’s regulations refine the general principle set forth in the Act by affirmatively stating that any applicant or holder of any Commission authorization shall not:

¹⁴ *Jefferson Radio Co. Inc. v. FCC*, 119 D.C. Cir. 256, 350 F.2d 781, at 783 (1964).

¹⁵ *In re Applications of RKO General Inc.*, Memorandum Opinion and Order, 3 FCC Rcd. 5057, at 5060-5061 (1988).

¹⁶ *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183 at n. 11 (1986), recon. granted in part, denied in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. *National Association for Better broadcasting v. FCC*, No. 86-1179 [hereinafter *Character Policy Statement*].

¹⁷ *Id.* at 1210.

¹⁸ 47 U.S.C. § 312(a)(1). *See also* 47 U.S.C. §308.

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is being made from being incorrect or misleading; and (2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.¹⁹

The relevant character traits the Commission is concerned with are “truthfulness” and “reliability.”²⁰ The actions that Emmis have taken have been in no way made in good faith, exemplifying intentionally and without a reasonable basis willful misrepresentations, lack of candor, and abuse of process.

A. Willful Misrepresentations.

“The act of willful misrepresentation not only violates the Commission’s Rules; it also raises immediate concerns over the licensee’s ability to be truthful in any future dealings with the Commission.”²¹ The Commission states that the five elements for the offense of misrepresentation are: “(1) a statement; (2) falsity; (3) materiality; (4) intent; and (5) agency jurisdiction.”²² As has been set forth above, Emmis has consistently, throughout its pleadings filed with respect to BCA’s applications, submitted false statements that are material to the Commission’s decision whether to grant BCA’s Section 325 applications. Emmis’s intent obviously is to use these false statements to convince the Commission to deny the BCA applications. The Commission takes such false statements so seriously that “The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.”²³ As the

¹⁹ 47 C.F.R. § 1.17.

²⁰ *Character Policy Statement*, *supra* note 14, at 1209.

²¹ *Id.*

²² *In re Applications of Fox River Broadcasting, Inc.*, Decision, 88 FCC 2d 1132, at 1136 (1982) [citations omitted] [hereinafter *Fox River*].

²³ *Character Policy Statement*, *supra* note 14, at 1210. See also *FCC v. WOKO, Inc.*, 329 U.S. 223, 677 S. Ct. 213 (1946). “The fact of concealment may be more significant than the facts concealed. The willingness to deceive a

Commission has itself stated, “The integrity of the Commission’s processes cannot be maintained without honest dealing with the Commission by licensees.”²⁴ In the present case, Emmis has failed to live up to the standard for truthfulness demanded of Commission licensees and, as a result, the Emmis assignment applications must be denied.

B. Lack of Candor.

The Commission has held that a lack of candor “involves concealment, evasion, and other failures to be fully informative.”²⁵ The core of lack of candor is omission, and can be characterized several ways: “evasiveness, failure to provide ‘complete and meaningful information,’ ‘skirting’ a question by providing information ‘technically correct’ but unedifying, or the playing of procedural games.”²⁶

Emmis’s submissions are classic examples of such playing of games. Emmis makes the representation that the XHBCE-FM Class B site is nowhere to be found, but its consultant fails to slightly swing his camera to the side where the Class B facility can be seen. Emmis claims that the Class C1 antenna is oriented to the northwest, but careful review of the pictures taken by Emmis’s own consultant reveals that the antenna is pointed in precisely the direction in which it should be pointed. Emmis argues that the pattern of the Class C1 antenna violates the terms of the coordination between the United States and Mexico, but ignores the plain language of the Treaty. The conclusion is inescapable that Emmis has failed to be candid with the Commission and that, as a result, its assignment applications must be denied.

regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.” *Id.* at 227.

²⁴ *Character Policy Statement*, *supra* note 14, at 1211.

²⁵ *In re Applications of Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, at 129 (1983).

²⁶ *Fox River*, *supra* note 20, at 1137 [citations omitted].

C. Abuse of Process.

Emmis claims that it had standing to file its Petition to Deny and Informal Objection against BCA's Section 325 applications because "as the owner of radio stations in the U.S., including stations in the states that border Mexico, it has a stake in the integrity and the reliability of station notifications under U.S. broadcast agreements with Mexico."²⁷ Emmis seeks to justify its actions by quoting the Commission stating that it "relies on members of the public to act as private attorneys general to assist in overseeing the conduct of the applicants and licensees and in fulfilling [the Commission's] statutory functions."²⁸

Emmis has taken this role of "private attorneys general" to an extreme that the Commission deems inappropriate. The Commission has reminded parties to its proceedings that its rules "prohibit the filing of frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the Commission or its staff"²⁹ and that such misconduct as the filing of strike applications and harassment of opposing parties, which threaten the integrity of the Commission's licensing processes, directly bear on a licensee's character.³⁰ The above recitation of facts makes it clear that Emmis has engaged in its concerted course of conduct of delay to try to gain a level of protection for KPWR(FM) to which that station is not entitled and to harass any party seeking to provide programming over XHBCE-FM in the hope that the lack of programming for that station could force the station to modify its facilities – despite the fact that the facilities in use by the station have already been coordinated with the United States. Emmis is simply using the Commission's processes to advance its own private ends.

²⁷ *Emmis BCA Petition, supra* note 2, at 2 (petition filed by Emmis Communications Corp. and Lazer Broadcasting Corp.).

²⁸ *Id.* (citing: *1998 Biennial Regulatory Review*).

²⁹ *Commission Taking Tough Measures Against Frivolous Pleadings*, Public Notice, 11 FCC Rcd 3030 (1996).

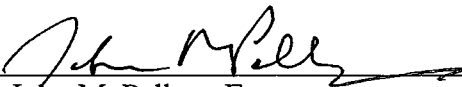
³⁰ *Character Policy Statement, supra* note 14, at 1211.

III. Conclusion.

Emmis's persistent misrepresentations, lack of candor and willingness to abuse the Commission's processes all evidence that Emmis is unfit to be a Commission licensee. As a result, applicable precedent mandates that the above-referenced assignment applications be denied.

Respectfully submitted,

BROADCAST COMPANY OF THE AMERICAS, LLC

By: 
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Deborah J. Salons, Esq.

Its Attorneys

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Washington, D.C. 20007
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Date: September 29, 2005

EXHIBIT 3

EMMIS TELEVISION LICENSEE, LLC
DA 05-3094 (released November 29, 2005)



Federal Communications Commission
Washington, D.C. 20554

NOV 29 2005

DA 05-3094
Released: November 29, 2005

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Washington, DC 20006

Journal Broadcast Corporation
c/o Meredith S. Senter, Jr., Esq.
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2000 K Street, NW
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Broadcast Company of the Americas, LLC
c/o John M. Pelkey, Esq.
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Re: Petition to Deny Various Applications for Assignment of License from Emmis Television License, LLC¹

Dear Counsel:

This is in regard to the applications to assign the licenses of several television stations currently controlled by Emmis Broadcasting License, LLC (Emmis) to Journal Broadcast Corporation

¹ A list of the applications covered by this letter is attached as Exhibit A.

(Journal) and LIN Television Corporation (LIN). A petition to deny the applications was filed by Broadcast Company of the Americas, LLC (BCA). Emmis filed an opposition to the petition. LIN and Journal filed a combined opposition to the petition. BCA filed a reply to the oppositions. For the reasons stated below, we deny the petition and either grant or defer action on the individual applications as stated below.

In its petition, BCA states that it is in the business of providing programming over Mexican stations pursuant to Section 325 of the Communications Act.² In its September 29, 2005 Petition to Deny, BCA contends that Emmis and another entity, Lazer Broadcasting Corporation (Lazer),³ abused Commission processes in a proceeding involving Section 325 applications filed by BCA to provide programming over the Class B and Class C1 facilities of station XHBCE-FM, Ensenada, Baja North California, Mexico. BCA alleges "willful misrepresentation, lack of candor and abuse of the Commission's process" by Emmis in opposing BCA's application which renders Emmis unqualified to be a Commission licensee. Therefore, BCA argues that the assignment applications that are the subject of this letter should be dismissed.⁴

In their petition to deny BCA's Section 325 applications, Emmis and Lazer alleged that the licensee of XHBCE-FM had constructed facilities that had not been coordinated with the United States and that XHBCE-FM's Class B facilities were not constructed at the appropriate location. That petition further stated that the antenna of XHBCE-FM's Class C1 facility was pointed to place its major lobe to the northwest, that those facilities were operating when they should not have been and that they were causing interference to Lazers' station KXRS(FM), Hemet, California.

In its petition to deny in this proceeding, BCA attacks Emmis claim to have standing in the XHBCE-FM proceeding. Although Emmis, as a broadcaster, claimed to have a "stake in the integrity and reliability of station notifications under U.S. broadcast agreements with Mexico,"

² Section 325(c) of the Communications Act states:

No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefore.

Section 325 applications are handled by the Commission's International Bureau. This letter does not represent a ruling or comment on the merits of BCA's Section 325 applications.

³ Lazer is not a party to this proceeding.

⁴ Emmis argues that BCA lacks standing to file its petition to deny. BCA has not made a showing that it has standing, but instead has only alleged that it is an "aggrieved party" because of Emmis's role in the Section 325 proceedings. However, because the allegations in BCA's petition go to the issue of Emmis's character and its basic qualifications to be a licensee, we have considered the matters raised in its pleadings.

BCA says that Emmis was actually trying to protect its station KPWR(FM), Los Angeles from interference with the XHBCE(FM) signal. BCA claims that Emmis, therefore, was abusing the Commission's processes by trying to obtain a level of protection for its station to which it was not entitled.

BCA goes on to claim that Emmis's pleadings in the Section 325 proceedings were "rife with misrepresentations." BCA states that Emmis claimed that the XHBCE-FM Class B facilities were not constructed at the appropriate location. As Emmis points out in its opposition, however, BCA admits that the facilities were constructed "a few hundred feet" from the authorized site. BCA also asserts that Emmis sought to mislead the Commission by "playing games" with the name for the Class B site. Emmis states that BCA's consultant identified the Class B site as "at the peak" of Cerro Grande, while Emmis offered up a topographical map showing the "Peak of Cerro Grande" is 2.55 kilometers and 1700 feet higher in elevation than the facility's authorized location. BCA claims that Emmis also sought to mislead the Commission when it claimed that XHBCE-FM's had commenced operations at its Class C1 facility, while Emmis claims that its consultant detected unauthorized operations. BCA states that Emmis falsely alleged that the antenna was not properly oriented, while Emmis claims it has raised legitimate questions based on the photos of its own consultant and those of BCA's consultant, as well as on the manufacturer's drawings.

BCA alleges that Emmis has acted to delay action on a request for Special Temporary Authority to use the Class C1 facilities for certain programming. Emmis counters that BCA has been the one to ask for extensions of time in that proceeding. In its reply to the opposition, BCA claims that that extension to which Emmis refers was sought by another party to the proceeding. Finally, BCA alleges that Emmis has refused to work with BCA to resolve interference concerns.

We will not attempt to resolve any of the factual issues related to the Section 325 proceedings. Those issues, and the issue of whether Emmis has standing in those proceedings, will be resolved in due course by the International Bureau. The only issues before us are whether Emmis's participation in the Section 325 proceedings represents an abuse of process and whether, therefore, Emmis lacks the requisite character to be a Commission licensee.

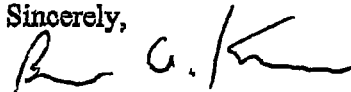
In its order on *Character Qualifications*, the Commission defined "abuse of process" as "serious willful misconduct that directly threatens the integrity of the Commission's licensing processes."⁵ An example of such misconduct is the filing of a "strike petition," which is the essence of what BCA has alleged that Emmis did in the Section 325 proceeding. In determining whether a pleading is a strike petition, the Commission considers several factors: (1) statements by the petitioner's principals or officers admitting the obstructive purpose; (2) the withholding of information relevant to disposition of the issues raised; (3) the absence of any reasonable basis for the allegations raised in the petition; (4) economic motivation indicating a delaying purpose;

⁵ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1211 (1986).

and (5) other conduct by the petitioner.⁶ In this case, these factors have not been demonstrated. Most notably, the allegations made by Emmis in the Section 325 proceeding appear to have had a reasonable basis. BCA has even admitted that Emmis's allegation that the XHBCE-FM transmitter was not constructed at the appropriate location is true. In fact, all of the statements made by Emmis that BCA claims are either false or misleading appear, based on the record in this proceeding, to at least be the subject of legitimate dispute. The accuracy of each party's allegations in the Section 325 proceeding, and the weight to be given to those allegations, will be resolved by the International Bureau and are not an appropriate subject for this assignment proceeding. However, BCA has not demonstrated in this proceeding that Emmis has abused the Commission's processes or that it lacks the requisite character to be a Commission licensee. Therefore, we will deny BCA's petition. Furthermore, we find that grant of the applications would be in the public interest and we find the applicants are fully qualified to be licensees.

ACCORDINGLY, IT IS ORDERED THAT the petition to deny filed by Broadcast Company of the Americas, LLC IS DENIED. FURTHERMORE, the applications to assign the following licenses: (1) KGUN(TV), Tucson, Arizona, File No. BALCT-20050826AAB and WFTX(TV), Cape Coral, Florida, BALCT-20050826AFE from Emmis Television License, LLC to Journal Broadcasting Corporation; (2) KRQE(TV), Albuquerque, New Mexico, File No. BALCT-20050825ABS and KBIM-TV, Roswell, New Mexico, File No. BALCT-20050825ADB from Emmis Television License, LLC to LIN of New Mexico, LLC; (3) KREZ-TV, Durango, Colorado, File No. BALCT-2050825AEB, from Emmis Television License, LLC to LIN of Colorado, Inc; (4) WALA-TV, Mobile, Alabama, File No. BALCT-20050825AEY, from Emmis Television License, LLC to LIN of Alabama, LLC; (5) WLUK-TV, Green Bay, Wisconsin, File No. BALCT-20050825AFA, from Emmis Television License, LLC to LIN of Wisconsin, LLC and (6) WTHI-TV, Terra Haute, IN, File No. BALCT-20050825AFC, from Emmis Television License, LLC to Indiana Broadcasting, LLC are GRANTED. Action on the application to assign WBPG(TV), Gulf Shores, Alabama, File No. BALCT-20050825AEZ from Emmis Television License, LLC to LIN of Alabama IS DEFERRED pending resolution of that station's renewal application.

Sincerely,



Barbara A. Kreisman
Chief, Video Division
Media Bureau

⁶ See *Radio Carrollton*, 69 FCC 2d 1138, 1150 (1978), clarified, 69 FCC 2d 424 (1978), recon. denied, 72 FCC 2d 264 (1979), aff'd sub nom., *Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. October 15, 1980), cert. denied, 450 U.S. 1041 (1981).

EXHIBIT A

<u>Station</u>	<u>Id No.</u>	<u>City of License</u>	<u>File No.</u>
KGUN(TV)	36918	Tucson, AZ	BALCT-20050826AAB
WFTX(TV)	70649	Cape Coral, FL	BALCT-20050826AFE
KRQE(TV)	48575	Albuquerque, NM	BALCT-20050825ABS
KBIM-TV	48556	Roswell, NM	BALCT-20050825ADB
KREZ-TV	48589	Durango, CO	BALCT-20050825AEB
WALA-TV	4143	Mobile, AL	BALCT-20050825AEY
WBPG(TV)	83943	Gulf Shores, AL	BALCT-20050825AEZ
WLUK-TV	4150	Green Bay, WI	BALCT-20050825AFA
WTHI-TV	70655	Terre Haute, IN	BALCT-20050825AFC

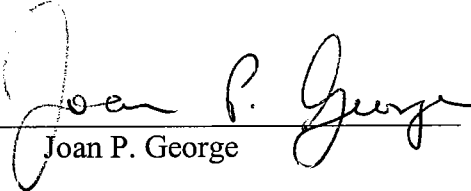
CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a true copy of the *Opposition to Petition to Deny* was sent this 20^h day of January, 2006, by hand and by e-mail where indicated and via United States First Class Mail, postage prepaid, to the following:

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