

June 20, 2006



Donna C. Gregg  
Chief, Mass Media Bureau  
Federal Communications Commission  
Washington, DC 20554

RE: Applications for Assignment of Licenses from Aberdeen Radio Ranch, Inc. to Armada Media Corporation

BAL-20060516ADD KSDN Aberdeen, SD  
BAL-20060516ADF KGIM Aberdeen, SD  
BALH-20060516ADE KNBZ Redfield, SD  
BALH-20060516ADG KGIM-FM Redfield, SD  
BALH-20060516ADH KBFO Aberdeen, SD  
BALH-20060516ADI KSDN-FM Aberdeen, SD

Dear Ms. Gregg:

This is an informal objection to the proposed assignment of six broadcast radio licenses from Aberdeen Radio Ranch, Inc. to Armada Media Corporation ("Armada"). See *Public Notice*, Report No. 26240 (Released May 22, 2006). The basis of this objection is that P. Nicholas Hurtgen, an attributable owner of Armada, is under federal indictment for seven felonies.

Media Access Project ("MAP") asks that the Commission defer action on the applications because there is a substantial and material issue of fact as to whether Armada can meet its burden of establishing as a matter of law that it is qualified to be a Commission licensee. In the event the Commission declines to afford the requested relief, MAP asks that, at the least, the Commission condition any grant of the application on the outcome of Mr. Hurtgen's upcoming trial.

Because this case presents circumstances not explicitly addressed by current Commission policy, MAP respectfully suggests that this matter must be referred to the full Commission for disposition pursuant to 47 CFR §0.283(c).

Insofar as the circumstances surrounding this matter expose a serious flaw in Commission policies and practices, MAP also asks that the Commission use this case as an opportunity to revise its policies to require that applicants for broadcast licenses disclose to the Commission when they, or an attributable owner, has been indicted for felonious conduct, and that the Commission automatically defer action on such applications pending resolution of the criminal charges.

#### **BACKGROUND**

P. Nicholas Hurtgen is the sole member of LPL Partners LLC. LPL Partners owns a 12.5%

voting interest in Armada. Thus, Mr. Hurtgen is an attributable owner of Armada.<sup>1</sup> On May 9, 2005, Mr. Hurtgen was indicted by a federal grand jury in the Northern District of Illinois on three counts of mail fraud, three counts of wire fraud and one count of extortion, all felonies. See *U.S. Department of Justice Press Release*, “Levine, Kiferbaum and Hurtgen Indicted On Fraud Charges Alleging Kickbacks, Influence-Peddling and Insider-Dealing,” May 9, 2005. One party to the 28 count master indictment has already pleaded guilty.

Section 308 of the Communications Act directs the Commission to prescribe minimum qualifications for license applicants, specifically including character qualifications.<sup>2</sup> The Commission has determined that applicants or principals convicted of “non-broadcast related” felonies will generally be considered to lack the requisite character to be a broadcast licensee. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990) (“1990 Character Policy Statement”). Under this policy, the Commission will inquire into such felony convictions in considering whether to initiate revocation proceedings for incumbent licensees, see *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000) or to take up the character issue in conjunction with the next license renewal application. The Commission also evaluates disqualifying misconduct when licensees attempt to sell their stations; the conduct of both buyers and sellers<sup>3</sup> is reviewed. A party such as Armada, which is not currently a licensee, must demonstrate that there are no substantial and material questions of fact as to whether it is qualified and, more generally, that grant of its application is in the public interest.

Indictments are not adjudications, and an indictment is not disqualifying in and of itself. However, the pendency of an indictment raises serious questions as to whether a licensee or applicant will become disqualified from being a Commission licensee. It follows, then, that when an applicant or an attributable owner of an applicant is under indictment for multiple counts of serious felonies, the applicant cannot meet the burden of demonstrating that there are no substantial and material issues of fact as to its qualifications to be a Commission licensee and, thus, whether grant of the application is in the public interest. Accordingly, the Commission has stated that when it is made aware of serious potentially disqualifying information, it will “retain the discretion to condition a grant on the outcome of pending litigation or take other action...” *Policy Regarding Character Qualifications in Broadcast Licensing*, 7 FCC Rcd 6564, 6566 n.28 (1992).

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<sup>1</sup>The other attributable owners of Armada are Jim Coursolle, Chris Bernier, John R. Larson, John Lynch, Terry Shockley and Tommy G. Tompson. MAP wishes to stress that it takes no issue with the character qualifications of any of these individuals.

<sup>2</sup>“Section 308(b) both gave it ‘the authority and imposed upon it the duty’ to examine basic character qualifications ‘in evaluating applicants for radio facilities.’ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179, 1185 (2086) (quoting *1951 Uniform Policy*, 42 FCC 399, 400 (1951)).

<sup>3</sup>In most instances, incumbent licensees may not assign or transfer their licenses if they are no longer qualified to be a Commission licensee. *Jefferson Radio Corp. v. FCC*, 340 F.2d 921 (D.C. Cir. 1964).

## DISCUSSION

Because of the fact that the Commission counts on the public to make it aware of pending indictments of new applicants, and the apparent rarity of an indicted party having the temerity to seek to become a Commission licensee, there appears to be no published case law construing the Commission's current *Character Policy Statement* to the situation presented here. MAP respectfully suggests that the Commission can best implement its policy by deferring action on the Armada application until Mr. Hurtgen's status is resolved. Given the seriousness of the seven felonies for which Mr. Hurtgen was indicted, and the difficulty and disruption of requiring a disqualified licensee to turn in its license,<sup>4</sup> or to effectuate a revocation,<sup>5</sup> the applicants, as well as the public, would be best served if the Commission did not take action to grant the Armada applications until such time as Mr. Hurtgen may be exonerated.

In the event that the Commission is disposed to act upon the Armada application before Mr. Hurtgen goes to trial, MAP asks that the Commission follow its stated policies by conditioning any grant of Armada's applications upon the outcome of Mr. Hurtgen's case.

## REQUEST FOR MODIFIED DISCLOSURE POLICY

In the *1990 Character Policy Statement, supra*, the Commission directed applicants to inform the Commission as to indictments of applicants or their attributable owners. However, on reconsideration, the Commission chose to blind itself to the facts by removing this requirement. *Policy Regarding Character Qualifications in Broadcast Licensing*, 7 FCCRcd 6564, 6565-66 28 (1992).

It is apparent that this revision was adopted with civil, and not criminal, litigation in mind. In any event, it has proven unworkable. The Commission proceeds in blissful ignorance as to whether new applicants are facing criminal charges, no matter how severe they may be. The failure to inquire into whether applicants may be on the verge of disqualification is inefficient, promotes public mistrust of the Commission and is antithetical to the kind of informed decisionmaking that the public expects. This is not to say that all pending criminal cases will result in adjudications of guilt; should an applicant be exonerated, the Commission can and should proceed to grant the application. Given the expensive, time consuming and disruptive effect of having to deal with the conviction of an incumbent licensee, it is far better to defer action on an application than to grant it, even with conditions.

Accordingly, MAP asks that the Commission use this opportunity to modify its policy and to require applicants to inform the Commission when applicants or attributable owners of applicants are indicted for felonies.

## CONCLUSION

Licensed broadcasters are fiduciaries given exclusive access to publicly-owned spectrum, free

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<sup>4</sup>See, e.g., *RKO General, Inc. (KHJ-TV)*, 4 FCCRcd 1403 (1989) (describing 23 years of litigation).

<sup>5</sup>See *Contemporary Media, Inc. v. FCC, supra*.

of charge. They are expected to protect the public safety during times of emergency, and to place the interests of the public ahead of their own in addressing issues of public importance. They are, quite literally, an integral component of democratic self-governance, charged with affording equal opportunities to candidates for public office without discrimination or favoritism.

Congress and the FCC have long recognized that broadcasters' willingness to comply with the law is an important measure of their character. The mere possibility that an applicant not presently licensed by the Commission owners will be convicted of multiple felonies surely raises substantial and material questions as to whether that applicant should be allowed to become a broadcast licensee.

Therefore, MAP asks that the Commission withhold action on above-listed applications until such time as there is a final disposition of the criminal charges against Mr. Hurtgen. If the Commission does take action on the applications, it should condition the grant of any license to Armada upon the outcome of the criminal charges against Mr. Hurtgen. MAP also asks that the Commission modify current policies to require that applicants or their attributable owners be required to disclose to the Commission any and all indictments against them for felonious misconduct, and grant all such other relief as may be just and proper.

Respectfully submitted,

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