Character Qualifications, Abuse of Process
Character Qualifications, Concealment
Character Qualifications, Effect of Criminal Conviction
Character Qualifications, Effect of Misrepresentation
Character Qualifications, Lack of Candor
Character Qualifications, Non-Applicant

Report and Order and Policy Statement adopted establishing general guideline principles to be sued in evaluating the character qualifications of b/c applicants. This action establishes the range of relevant behavior, both FCC related and non-FCC related, which the Commission will consider in its licensing process. Policies pertaining to character implications in the corporate and multiple ownership context are clarified. This action eliminates character as an issue in comparative proceedings unless the character defect goes to the applicant's basic qualifications.

— *Character Qualifications*

Gen Docket 81-500

FCC 85-648

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Policy Regarding Character Qualifications In Broadcast Licensing	Gen. Docket No. 81-500
Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees	BC Docket No. 78-108

REPORT, ORDER AND POLICY STATEMENT

Adopted: December 10, 1985; Released: January 14, 1986

BY THE COMMISSION:

I. INTRODUCTION

1. Before the Commission is our *Notice of Inquiry* (hereinafter "NOI") in Gen. Docket No. 81-500[1], regarding character qualifications in broadcast licensing, and the comments and reply comments submitted in response thereto. Also before the Commission is our *Notice of Proposed Rule Making* (hereinafter "NPRM") in BC Docket No. 78-108[2], concerning establishment of new broadcast rules mandating the submission of timely and accurate responses to Commission inquiries by permittees and licensees, and the comments filed in response to that NPRM.[3] The related nature of these proceedings makes their joint consideration appropriate.[4]

II. Purpose of the Proceeding

2. Section 308(b) of the Communications Act states in pertinent part that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station . . . . " (Emphasis supplied.) Similar language regarding construction permit applications is found in Section 319(a), and, under the provisions of Section 310(d) of the Act, applications for transfer or assignment of permits or licenses are treated as if the proposed transferee or assignee were filing under Section 308. The finding of facts regarding qualifications is not, however, an end in itself. Rather, it is a step in the process of evaluation by which the Commission determines whether the public interest would be served by grant of the application before it.[5]

---

[1] 87 FCC 2d 836 (1981).

[2] 43 Fed. Reg. 14693 (April 7, 1978).

[3] A complete list of those commenting in both proceedings appears as Appendix "A".

[4] *See* our discussion of BC Docket No. 78-108 in the NOI, 87 FCC 2d at 855, n. 59.

[5] *See* Sections 307(a), 309(a), and 319(c) of the Communications Act. Under Section 309(i), only the qualifications of the "tentative selectee" are fully examined. The sole broadcast service currently subject to licensing by lottery is

3. In the NOI, the Commission observed that we had, over the years, "considered a wide range of conduct in examining applicants' character." We stated that this action had been taken "without the benefit of a comprehensive policy statement detailing the relevance of the character examination to the broadcast licensing scheme and identifying what conduct is pertinent to the analysis."[6] It was the Commission's objective in this proceeding, we said, to develop a "clearly articulated licensing policy" which would allow us to "focus on behavior which is truly relevant to broadcast licensing and to tailor [our] actions to these licensing goals." Such a policy, we hoped, would facilitate "more consistent and, thus, fairer decisionmaking by the Commission." It would also "reduce the substantial amount of time and resources now spent by this agency examining questions relating to an applicant's conduct which, even if resolved against the applicant, would not cause the Commission to deny the application."[7]

4. The fundamental thrust of the NOI, then, was the Commission's concern that those "character" matters considered in broadcast licensing proceedings be clearly relevant to the licensing process, and that the process be made more equitable and efficient.[8] We explained that one source of difficulty in reaching such an objective has been the lack of Congressional guidance as to the definition of "character" to be utilized by the Commission. This has, on occasion, led to use by either the Commission or the courts of a wide-ranging notion of "moral" character of limited value in the licensing process.[9] Use of the absolutist concept of

---

low power television ("LPTV").

[6] We noted that the only policy guidance on this issue, which deals with but one aspect of it, was adopted more than thirty years ago. *Establishment of a Uniform Policy to be Followed in Licensing of Radio Broadcast Stations Cases in Connection with Violation by an Applicant of Laws of the U.S. Other than the Communications Act of 1934, as Amended*, 42 FCC 2d 399 (1951) (hereinafter *"Uniform Policy"*).

[7] NOI, *supra* note 1, at 837.

[8] Applicants' claims of inequitable treatment are a frequent feature of proceedings involving character. The Commission's obligation to explain departures from precedents in this area, and, where it relies on factual differences with such precedents, to explain the relevance of those differences to its purposes and those of the Communications Act (unless the differences are so obvious as to remove the need for explanation) was made clear in *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). *See also, White Mountain Broadcasting Co. v. FCC*, 598 F.2d 274, 277-280 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 963 (1979). As to the epic length and complexity which proceedings involving character issues may assume, *see RKO General, Inc. v. FCC*, 670 F.2d 215, 218-221 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Mid-Florida Television Corporation*, 87 FCC 2d 203, 204-209 (1981).

[9] The broadcast definition of character in this vein appears to have been articulated in *Mester v. United States*, 70 F. Supp. 118, 122 (E.D.N.Y. 1947),

3. In the NOI, the Commission observed that we had, over the years, "considered a wide range of conduct in examining applicants' character." We stated that this action had been taken "without the benefit of a comprehensive policy statement detailing the relevance of the character examination to the broadcast licensing scheme and identifying what conduct is pertinent to the analysis."[6] It was the Commission's objective in this proceeding, we said, to develop a "clearly articulated licensing policy" which would allow us to "focus on behavior which is truly relevant to broadcast licensing and to tailor [our] actions to these licensing goals." Such a policy, we hoped, would facilitate "more consistent and, thus, fairer decisionmaking by the Commission." It would also "reduce the substantial amount of time and resources now spent by this agency examining questions relating to an applicant's conduct which, even if resolved against the applicant, would not cause the Commission to deny the application."[7]

4. The fundamental thrust of the NOI, then, was the Commission's concern that those "character" matters considered in broadcast licensing proceedings be clearly relevant to the licensing process, and that the process be made more equitable and efficient.[8] We explained that one source of difficulty in reaching such an objective has been the lack of Congressional guidance as to the definition of "character" to be utilized by the Commssion. This has, on occasion, led to use by either the Commission or the courts of a wide-ranging notion of "moral" character of limited value in the licensing process.[9] Use of the absolutist concept of

---

low power television ("LPTV").

[6] We noted that the only policy guidance on this issue, which deals with but one aspect of it, was adopted more than thirty years ago. *Establishment of a Uniform Policy to be Followed in Licensing of Radio Broadcast Stations Cases in Connection with Violation by an Applicant of Laws of the U.S. Other than the Communications Act of 1934, as Amended,* 42 FCC 2d 399 (1951) (hereinafter *"Uniform Policy"*).

[7] NOI, *supra* note 1, at 837.

[8] Applicants' claims of inequitable treatment are a frequent feature of proceedings involving character. The Commission's obligation to explain departures from precedents in this area, and, where it relies on factual differences with such precedents, to explain the relevance of those differences to its purposes and those of the Communications Act (unless the differences are so obvious as to remove the need for explanation) was made clear in *Melody Music, Inc. v. FCC,* 345 F.2d 730 (D.C. Cir. 1965). *See also, White Mountain Broadcasting Co. v. FCC,* 598 F.2d 274, 277-280 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 963 (1979). As to the epic length and complexity which proceedings involving character issues may assume, *see RKO General, Inc. v. FCC,* 670 F.2d 215, 218-221 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 927 (1982); *Mid-Florida Television Corporation,* 87 FCC 2d 203, 204-209 (1981).

[9] The broadcast definition of character in this vein appears to have been articulated in *Mester v. United States,* 70 F. Supp. 118, 122 (E.D.N.Y. 1947),

"moral" character requires the Commission to explain why behavior which evidences sufficiently "bad" character to warrant denial of an application in one instance does not mandate the same result in another, apparently similar case.[10]

5. Additional difficulties arose, the Commission observed, in the disparity of treatment which had been accorded existing licensees, whose broadcast record might be factored into Commission analyses in mitigation of character "defects," and new nonbroadcaster applicants, as to whom no such record was available. Further complexity was involved in the disposition of "character" issues involving owners of groups of stations. For example, if the judgment is made that a broadcaster is of sufficiently "bad" character to be denied license renewal in one community, may that same "bad" entity still be allowed to retain a license in another community?

6. Our review of the record in this proceeding and the experience gained from years of evaluating the character qualifications of numerous applicants convinces us that substantial changes to the Commission's character policies are warranted. Generally, the Commission considers an applicant's character in two contexts. Initially, the Commission conducts an inquiry as to whether an applicant possesses the basic threshold character qualifications necessary to be a licensee or permittee. The second setting in which character issues may be raised is as part of a comparative proceeding. Once a character issue has been designated in a comparative proceeding, the Commission makes a determination whether an applicant should receive a comparative demerit. In this regard, the Commission's character evaluations in

---

aff'd per curiam, 332 U.S. 749 (1947), cited with approval in such cases as *Southeastern Massachusetts Broadcasting Corp.*, 12 FCC 363, 372 (1947); *WKAT, Inc.*, 29 FCC 221, 238 (I.D. 1958); *Armond J. Rolle*, 31 FCC 2d 533, 536, (Rev. Bd. 1971); and *RKO General, Inc.*, 78 FCC 2d 1, 48-49 (1980), *aff'd in part, remanded in part on other grounds, RKO General, Inc. v. FCC, supra* note 8. As to the dangers inherent in the use of such terminology as "good moral character," see *Konigsberg v. State Bar of California*, 353 U.S. 252, 262-264 (1957).

[10] *See supra* note 8. The Commission is not, of course, bound "to deal with all cases at all times as it has dealt with some that seem comparable," *FCC v. WOKO*, 329 U.S. 223, 228 (1946), and it frequently occurs that decisions turn on meaningful distinctions found in the course of case-by-case reviews. As to the difficulty of reconciling apparently disparate treatment, however, *see Cumberland Broadcasting Corporation v. FCC*, 647 F.2d 1341 (D.C. Cir. 1980) (Brief acquiescence in attorney misconduct does not warrant disqualification); *WADECO, Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980) (lengthier period of apparent acquiescence in attorney's actions leads to disqualification); *WEBR, Inc. v. FCC*, 420 F.2d 158 (D.C. Cir. 1969) (good faith reliance on counsel in case where application not properly amended avoids disqualification).

comparative proceedings have necessarily resulted in an attempt to determine which applicant possesses the best character and have caused parties to such proceedings to seek to impugn each others' character in pursuit of comparative hearing advantages.

7. We believe it is appropriate to modify both aspects of the Commission's character inquiry. With regards to the basic threshold character evaluation, we find that the scope of the present inquiry is overly broad. Accordingly, future inquiries into an applicant's basic character eligibility will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies. An analysis of these specific traits will serve as guidelines for all future inquiries regarding applicant misconduct. Thus, while we shall continue to refer to such evaluations as a character inquiry, the scope of our analysis will be much narrower than the term "character" implies. Consistent with this new approach, we will modify the range of both FCC related and non-FCC related misconduct that will be considered relevant to our inquiries.[11] In addition, modifications will be made to threshold character inquiries arising in the corporate and multiple ownership contexts. Second, we believe that once the basic character fitness of a potential licensee has been established, character issues should not be considered as a comparative issue. Thus, character issues will no longer be designated as comparative issues in either competing new or in comparative renewal proceedings.

8. We shall now turn to a discussion of the specific issues raised by the NOI in this proceeding. An analysis of issues relating to narrowing the focus of our threshold character inquiry appears in Section III below. Section IV contains a discussion of the issues relating to character in the comparative context. Our decision regarding the issues raised by the NPRM in BC Docket No. 78-108 can be found in section V.

III. Issues Analysis

9. The Commission addressed the issues inherent in the consideration of "character" by raising a series of questions in the NOI

[11] FCC related misconduct describes activity which violates the Communications Act or a specific Commission rule or policy. *See* 47 U.S.C. § 151 et. seq.; 47 C.F.R. §§ 0.1 et. seq. The term non-FCC misconduct describes misconduct which may be a violation of law but does not specifically contravene the Communications Act or a specific Commission rule or policy. In this regard, we note that non-FCC misconduct may include broadcast station related misconduct not specifically proscribed by the Act or the Commission. See *infra* at para. 31.

on which parties might comment. At the same time, we indicated our tentative views on these matters. We believe it appropriate to resolve the issues before us in a similar fashion. Thus, our format in this document will be to present the question first set forth by the Commision in the NOI, summarize our initial (NOI) views on the matter, discuss the comments received, and state our conclusions as to the policy to be followed in the future.

A. "Character" vs. "Conduct"

1. Questions in the NOI

10. The first two questions raised in the NOI lend themselves to joint consideration:

> "(a) What purpose is served by scrutinizing an applicant's so-called 'character' qualifications?"
>
> "(b) Is there a better way to evaluate an applicant's future reliability than the kind of wide-ranging inquiries conducted in the past?"

11. As to the purpose served by scrutinizing an applicant's character qualifications, the Commission stated in the NOI that while the applicant's legal, technical and financial qualifications help to establish the entity's ability to perform, they do not "tell us whether we can rely on the applicant to perform prospectively all of the obligations of a broadcast licensee." Thus, we tentatively concluded that "our concern with probable future behavior is unavoidable," and that if we have "reason to believe an applicant cannot be expected in the future to fulfill its obligations as a broadcast licensee, its application should be denied."[12]

12. However, the Commission questioned whether we should continue to attempt to forecast an applicant's reliability as a licensee by examining its *character* as such. Would it not be more appropriate, we asked, for the Commission to "evaluate *directly* the relevance of an applicant's past *misbehavior* to its capacity to use the requested radio authorization in the public interest." (Emphasis supplied). We stressed the point that in the licensing process, the "only relevant misconduct" might well be "that which aids us in predicting what type of broadcast activity may

[12] However, we questioned whether we should continue to try to predict the prospective broadcast performance of a new nonbroadcaster applicant. We asked whether, as to this new applicant, with no broadcast record, an alternative might be to "withhold judgment at the time of initial licensing and rely on our forfeiture and revocation powers to deal with actual problems with a licensee's performance." *See infra* para. 49.

be expected in the future." We suggested that past consideration of applicants' "moral" character had involved inquiries going substantially beyond these boundaries. Thus, we queried whether the Commission was "required specifically to consider an applicant's moral character during the licensing process." We requested comment on the actual nature of the duty, if any, imposed upon the Commission by Section 308(b) and Section 319(a).

2. Comments Regarding What Section 308(b) Requires

13. It appears that the threshold issue in this aspect of this proceeding is the matter of what sort of inquiry into character, if any, the Communications Act requires. Commenting parties' views in this regard may generally be summarized as concluding that, at the least, the Commission has substantial discretion under the statute to determine the manner in which it will consider character issues. Parties such as CBS, Inc. ("CBS") believe that the inquiries authorized by Sections 308(b) and 319(a) are permissive, while other commenters, including Citizens Communications Center ("Citizens"), see the provisions as mandatory. However, almost all of those commenting on this point agree that the Commission is allowed significant latitude as to the scope of the inquiry to be conducted. American Broadcasting Companies, Inc. ("ABC") and Tribune Company ("Tribune") further note that the focus of Section 308(b) and Section 319(a) is the consideration of the qualifications of the applicant "to operate the station," a concern which does not appear to mandate examination of an applicant's "moral" character in the licensing process.[13]

3. Conclusions on Section 308(b) Requirements

14. The Commission acknowledges, as the National Citizens Committee for Broadcasting ("NCCB") points out, that in the *Uniform Policy* the Commission itself concluded that 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." However, even in that document the Commission indicated its awareness of its discretion as to the substance of such examinations, stating that these inquiries obviously did not "include every aspect of an applicant's behavior, but only that part which has some reasonable relationship to ability to

[13] *See infra* para. 21.

operate a broadcast station in the public interest."[14]

15. A review of the case law on this point indicates that the courts have on a number of occasions read Sections 308(b) and 319(a) to require Commission inquiry into character.[15] This has not, however, been the conclusion reached in at least two recent cases. In *National Association of Regulatory Utility Commissioners v. FCC*,[16] the D.C. Circuit Court of Appeals interpreted Section 308(b) as leaving it "within the discretion of the Commission to decide which facts" relating to the factors, such as character, enumerated in that section, "it wishes to have set forth in applications." The Court found that "this leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate." This being so, the Court concluded, it necessarily followed that in the matter then in dispute the Commission was not required to consider the subject of financial fitness at all if it deemed that area "irrelevant to its regulatory scheme." In a subsequent case, *Black Citizens for a Fair Media v. FCC*,[17] the D.C. Circuit Court of Appeals, citing *NARUC I* with appoval, reaffirmed the Commission's discretion over the nature of the inquiries to be conducted as part of the licensing process.[18]

16. Upon reflection, we are of the view that the better-reasoned approach is that taken in *NARUC I* and *BCFM*. That is, we find that the list of subjects as to which the Commission "may inquire" in sections 308(b) and 319(a) is neither exhaustive nor

[14] *Uniform Policy*, 42 FCC 2d at 400.

[15] The cases generally provide little supporting analysis. *See Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594 598 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931 (1979), *reh. denied*, 442 U.S. 947 (1979); *Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196, 200 (D.C. Cir. 1974); *WEBR, Inc. v. FCC, supra*, at 164; *L.B. Wilson, Inc. v. FCC*, 397 F.2d 717, 719 (D.C. Cir. 1968); *Charles P.B. Pinson, Inc. v. FCC*, 321 F.2d 372, 374 (D.C. Cir. 1963); *Stahlman v. FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942). *See also, KSIG Broadcasting Company v. FCC*, 445 F.2d 704, 709–710 (D.C. Cir. 1971).

[16] 525 F.2d 630, 645 (D.C. Cir. 1976) *cert. denied*, 425 U.S. 992 (1976) (hereinafter "*NARUC I*").

[17] 719 F.2d 407 (D.C. Cir. 1983) *cert. denied* 104 S. Ct. 3545 (hereinafter "*BCFM*").

[18] The commission's discretion, the Court observed, runs both to defining the public interest and to determining the FCC procedures which "best assure protection of that interest." The Court did, however, read Section 308(b) "to require the inclusion of certain technical information, such as licensee ownership, although it does not prescribe specific questions." *Id.*, at 413. As to the matter of the Commission's discretion, see generally *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 206 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956); *FCC v. WOKO, supra* note 10, at 227-229; *Stahlman v. FCC, supra* note 15, at 127; *FCC v. Pottsville Broadcasting Company*, 309 U.S. 134, 138, 143-146 (1940).

mandatory. These statutory sections do not of themselves require that the Commission make any inquiry into the character qualifications of broadcast applicants.[19]

17. Whether and, if at all, to what degree the Commission ought to inquire into the character qualifications of its broadcast applicants is thus a matter which must be determined by consideration of the "regulatory scheme" of the Communications Act. In this regard, it appears that the relevant inquiry to be made is whether the "public interest" standard embodied in the Communications Act requires or would be served by the continuation of Commission inquiries into character as part of the licensing process. Assuming such an inquiry is appropriate, the question becomes whether an evaluation of an applicant's behavior should include all aspects of the applicant's character or whether the inquiry should focus on specific traits that are directly relevant to our regulatory scheme. Our resolution of this question is advanced by consideration of the responses to our question in the NOI as to the purpose served by scrutinizing an applicant's character qualifications.

4. Comments on Purpose of "Character" Scrutiny

18. We note that most commenters, including the National Radio Broadcasters Association ("NRBA"), the National Broadcasting Company, Inc. ("NBC"), Tribune and CBS, believe the proper focus of our qualifications inquiry is, as the Commission suggested in the NOI, prediction of the reliability of the broadcast service to be provided the public by the applicant. In taking this approach, NBC and others state, the Commission's concern should be with the predictive nature of significant past *conduct* upon the licensee's future broadcast performance, rather than with the morally-tinged *character* concept. The National Association of Broadcasters ("NAB"), however, suggests that the way to avoid judgments regarding "good" and "bad" character is to focus the Commission's licensing process on deterrence of misconduct and minimize "the making of predictive judgments concerning licensee fitness."

[19] We observe that this view also appears in accord with Judge Wright's dissenting opinion in *BCFM. BCFM, supra* note 16, at 430–431. Additionally, this reading is consistent with general principles of statutory construction. 2A C.D. Sands, *Sutherland Statutes and Statutory Construction* § 57.11 (4th ed. 1972).

19. Contrary to this approach, NCCB and the National Black Media Coalition ("NBMC") state that inquiring into *character* itself is necessary to fulfill the Commission's duty to ensure that broadcasters operate in the public interest. Citizens contends that as deregulation of broadcasting proceeds, the Commission's need to rely on its licensees' judgment and good faith increases, and that the character inquiry is relevant to trustworthiness. The Office of Communication, United Church of Christ ("UCC") views the inquiry into character qualifications as a positive means of determining the ability of the licensee to make good on its promises and obligations to the Commission, its advertisers and the general public.

20. ABC argues that as Section 308(b) is concerned with the Commission's inquiry into the qualifications of the applicant "to operate the station," the Commission should narrow its definition of "character" to the traits necessary to accomplish that purpose. To achieve that objective, ABC contends, the Commission must first define what constitutes station operation in the public interest, at least for these limited purposes. A grant would be consistent with the public interest, ABC suggests, if the Commission can find that "(a) the applicant can reasonably be expected to be honest and candid in its dealings with the Commission . . . and (b) the applicant can reasonably be expected to operate the broadcast facility consistent with the requirements of the Act, Commission rules and policies."[20] The essential affirmative character traits which are relevant to the Commission's statutory objectives, ABC concludes, are honesty and responsibility.[21]

5. Conclusions About Character and the Public Interest Standard

21. The Commission enjoys broad discretion "both to define the public interest and to determine what procedures best assure protection of that interest."[22] We find that there is great merit to

[20] The Commission, ABC states, does not appear to have ever required more, citing *Central Texas Broadcasting Co., Ltd.*, 74 FCC 2d 393, 396 (1979).

[21] As to the NOI's question regarding the usefulness of continuing to attempt to predict a new, non-broadcaster applicant's future broadcast performance, parties commenting on the matter, including CBS, ABC and Citizens, generally suggest that such inquiry, including some consideration of past nonbroadcast misconduct, if any, may be necessary. However, NAB argues that such inquiries regarding new applicants are of dubious value. *See infra* paras. 26–30.

[22] *BCFM, supra* note 17, at 413. See, also, *FCC v. WNCN Listeners Guild, supra* note 18, at 596; *FCC v. Pottsville Broadcasting Company, supra* note 18 at 137–138 (1940).

ABC's conclusion that for the purposes of the present discussion, a license grant would be in the public interest if the applicant can be expected to be honest in its dealings with the Commission and can also be expected "to operate the station" consistent with the requirements of the Communications Act and the Commission's rules and policies. ABC identifies the "character" traits of honesty and responsibility as relevant to fulfilling these objectives. Viewed from this perspective, we believe that inquiry into "character" as an element of the licensing process is consistent with the regulatory scheme. As the Commission long ago observed, licensing "enables future conduct." Issuance of an authorization "entails at best only an estimate that performance under the license will be worthy." Thus, it is wholly appropriate that in aid of the forecasting process, the Commission looks "for clues as to risks and for evidence as to expectable performance."[23] We believe, however, that the current broad ranging character inquiry may not properly isolate those aspects of behavior which are necessarily probative as to an applicant's future conduct. In this regard, we find that future evaluations should be narrowly focused on specific traits which are predictive of an applicant's propensity to deal honestly with the Commission and comply with the Communciations Act or the Commissions rules or policies. As Citizens suggests, deregulation emphasizes the significance of the Commission's judgments regarding applicants' prospective performance.

22. Further, it does not, upon consideration of the record developed in this proceeding, appear that it is necessary to halt review of character matters as such in order to reach the objectives which were identified in the NOI and appear to be concurred in by most commenting parties: Commission consideration under "character" criteria only of matters clearly relevant to the licensing process, with that process made more equitable and efficient.[24]

23. The key factor involved in the support of some commenters for a "conduct" as opposed to a "character" standard generally appears to be the desire for elimination of the morally-tinged decision-making of the past. However, establishing a dichotomy between "conduct" and "character" is not necessary to achieve-

[23] *Westinghouse Broadcasting Company, Inc.*, 44 FCC 2778, 2783 (1962) (hereinafter "*Westinghouse I*").

[24] As ABC notes in its reply comments, the question which emerges is not whether the Commission should confine its inquiry to relevant behavior, but what behavior is relevant.

ment of less value-laden decision-making.[25] The record developed herein clearly indicates that neither Sections 308(b) and 319(a) nor the public interest standard embodied in the Communications Act mandates the type of "good vs. bad/evil" treatment of "moral" character which sometimes colored past Commission deliberations. Focusing on the character traits necessary "to operate the station," as ABC suggests, seems a proper move in the direction of a more relevant, less value-laden character inquiry. This is the case both as to applicants who are now licensees and as to new nonbroadcaster applicants. ABC describes these traits as honesty and responsibility, for which the record indicates that the terms "truthfulness" and "reliability" might properly be substituted. Whether an applicant has or lacks these qualities is, of course, a matter which can only be addressed by considering behavior.[26] The "better way" to evaluate an applicant's future "reliability" than the sort of inquiries conducted in the past is generally identified by commenters addressing the issue as a narrowing of Commission concern to encompass only misconduct relevant to operation of broadcast stations.[27] And so a fundamental issue which the remainder of this document seeks to address is the nature of the conduct relevant to making the requisite character findings. We will be concerned with misconduct which violates the Communications Act or a Commission rule or policy, and with certain specified non-FCC misconduct which demonstrate the proclivity of an applicant to deal truthfully with the Commission

[25] Further, it is the case that character is exemplified by conduct.

[26] We observe that deterrence is also an element of the character qualifications process, as the deterrent effect of our actions helps to ensure future reliability and truthfulness. *See FCC v. WOKO*, *supra* note 10, at 228. Thus, deterrence is a factor which exists within the penumbrae of the character traits with which we are concerned. *See infra* para. 103.

[27] Section 73.24(d) of the Commission's Rules, which was adopted June 30, 1939, (4 Fed. Reg. 2714, 2716), requires that an applicant for an AM station be of "good" character. Similar rules were not adopted for the other broadcast services. We will interpret Section 73.24(d) consistently with the action taken herein. We do not find, as ABC suggests, that it is necessary either to amend Section 73.24(d) or to add similar rules for the other services. It should be noted that as to our question regarding a "better way" to evaluate future reliability, some commenters, such as NCCB, contend the current policies, if clarified, would be well-suited to effectuating the Commission's proper purposes. Commenters including BML Associates ("BML"), a minority-owned consulting firm active in the communications industry, and the National Association for Better Broadcasting ("NABB") argue that the Commission should continue to be concerned with what sort of persons ought to be permitted to become "fiduciaries for the public."

and to comply with our rules and policies.

B. Prediciting Applicant Reliability

1. Questions Regarding Range of Relevant Behavior

24. As to this point, it is appropriate to consider the third question raised by the Commission in the NOI:

> "(c) What types of behavior are reasonably related to predicting an applicant's future reliability as a broadcaster?"

25. The Commission set forth lengthy tentative views under this heading, concluding as an initial step that "our attention as a regulatory agency should be focused on matters directly relevant to performance as a broadcaster in the public interest." As to non-FCC misconduct, we contended that we "lack the expertise and the resources to interpret other statutes and to make value judgments about behavior unrelated to the broadcast licensing function." Thus, we solicited comment as to whether Commission considerations could be limited to "misconduct which directly affects the broadcaster's use of licensed facilities and the broadcast service to be rendered to the public as well as the Commission's ability to protect the public."

a. Existing Licensees

26. The Commission further divided the discussion into consideration of the treatment to be afforded applications involving existing licensees as differentiated from the handling of filings from new applicants. We suggested that as to existing licensees, "the best predictor of future service is the applicant's past [broadcast] service". We questioned whether in forming our judgments as to how such applicants might perform in the future our licensing concerns

> should be limited to broadcast misconduct such as misrepresentation or lack of candor to the Commission, deception or defrauding of the broadcast public, abuse of broadcast facilities through fraudulent or anticompetitive commercial practices, and violations of the Communications Act or the Commission's rules and policies.

b. New Nonlicensee Applications

27. As to new nonlicensee applicants, the primary focus of the Commission's NOI discussion was "whether any misconduct which does not involve broadcasting is relevant to our licensing responsibility and, if so, which types of misconduct are perti-

nent." The Commission remarked that we had previously "examined nonbroadcast related misconduct on the theory that it demonstrates a propensity to violate regulations designed for public protection." We stated that while we did not "doubt the appropriateness of examining *pertinent* aspects of an applicant's past history,"[28] we did question "the pertinence of most activities engaged in outside the field of broadcasting to predicting future broadcast conduct." We specifically solicited comment as to whether the current scope of the *Uniform Policy* is appropriate.

2. Comments Regarding Range of Behavior Relevant to Applicant Reliability

a. Existing Licensees

28. Commenters including ABC, NBC, American Family Corporation ("AFC"), Tribune, CBS, and John Blair & Company/Post-Newsweek Stations ("Blair/Post Newsweek") generally concur with the Commission's tentative decision that inquiries regarding existing licensees should focus on the applicant's broadcast record. Thus, NBC states that the Commission should limit its considerations to specific conduct which has had a substantial impact on the licensee's broadcast service, which is likely to recur and which would therefore indicate that the licensee's future service as a broadcaster would not serve the public interest. CBS proposes that the questionable behavior's impact on the broadcast audience be the key issue. CBS contends that whether a licensee has made loans at usurious rates of interest or been involved in questionable activities abroad seems to be of highly dubious relevance to the broadcast service provided to the audience. NRBA would confine the inquiry to instances of clear misrepresentation to the Commission, and to station-related misconduct only as that is relevant to future reliability. ABC would, however, make an exception to the broadcast-only rule for consideration of non-FCC misconduct "so egregious as to preclude a continued finding that the applicant is honest and reliable."[29]

[28] Citing *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D. C. Cir. 1950).

[29] ABC states in support of this exception that if "character" were absolutely limited to broadcast performance, "a licensee could, for example, assassinate the President of the United States and still receive a regular renewal if no defect were found in its station operations." ABC argues that "[s]uch a result would be outrageous." A related stance is taken by BML which suggests that the Commission at the least should consider the fact that an applicant is "a murderer, or a terrorist, or had been convicted of felonies involving moral turpitude."

29. A different position on the issue is taken by parties including NCCB, UCC and the Committee for Community Access ("CCA"). They contend that both broadcast and nonbroadcast behavior is relevant to the degree such behavior raises questions about an applicant's ability to serve the public interest. UCC further states that in examining nonbroadcast conduct, the Commission should not be bound by the determinations of other forums, which may have nothing to do with the scheme of broadcast regulation. Citizens, NBMC and NCCB argue that Commission and various parties have overstated the difficulties and flaws inherent in implementation of our traditional system of character review.

b. New Nonlicensee Applicants

30. Comment regarding the consideration of nonbroadcast misconduct in cases involving new nonlicensee applicants was quite diverse. ABC and CBS see the need to make predictive judgments as requiring some scrutiny of nonbroadcast activity. Citizens and UCC argue that such inquiries are needed because, *inter alia*, an initial evaluation of character cannot be replaced by forfeiture or revocation proceedings, which are too complex and place too heavy a burden on the Commission. NAB contends that such inquiry should be confined in scope if the Commission feels compelled to conduct it. NAB would limit consideration of the nonbroadcast activities of new applicants to adjudicated felony convictions (which would not be automatically disqualifying). NAB observes that there is substantial ground for a presumption of reliability to be accorded to any applicant, absent serious indications to the contrary. Blair/Post-Newsweek take the position that since wrongdoing in nonbroadcast affairs is not necessarily predictive of service to the public, the burden should be on the party asserting that a character defect inheres in such behavior to make the connection. We are of the view that the range of non-FCC behavior should be the same for both new nonbroadcaster applicants and incumbent licensees/permittees.

3. Conclusions on Range of Relevant Non-FCC Behavior

31. A character qualification established by government "must have a rational connection with the applicant's fitness" to do the thing sought to be done.[30] Our consideration of the record

[30] *Schware v. Board of Bar Examiners of New Mexico*, 353 U. S. 232, 239 (1957).

developed herein, together with our experience in administering the *Uniform Policy* for more than three decades, leads us to the conclusion that the necessary "rational connection" cannot be found in many of the types of situations as to which the Commission has over the years considered the non-FCC misconduct of its broadcast applicants.

32. In the *Uniform Policy*, the Commission stated that "pertinent aspects of the past hisotry of the applicant"[31] would "clearly include any violation of Federal law," noting that we had in the past considered such conduct as "violations of Internal Revenue laws, conspiracy to violate antitrust laws, false advertising and other deceptive practices." The Commission held that it was "irrelevant to a determination of qualifications whether the finding of violation is in a civil or criminal case," that no significance was to be awarded to the nature of the tribunal making the finding, and that even if no suit has been filed, or a suit filed but not heard or finally adjudicated, "the Commission may consider and evaluate the conduct of an applicant in so far as it may relate to matters entrusted to the Commission."

33. Through the years, the Commission has generally declined "to explore matters currently being litigated before the courts or to duplicate the ongoing investigative efforts of other government agencies charged with the responsibility of interpreting and enforcing the law in question."[32] Nonetheless, we have been led to consider an incredible range of non-FCC behavior.[33] Even egre-

[31] Citing *Mansfield Journal Co. v. FCC*, *supra* note 28.

[32] *Revision of FCC 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 59 FCC 2d 750, 763 (1976). For a recent review of our practice in this regard, *See Alan K. Levin*, FCC 84R-18, 55 R.R.2d 981 (Rev. Bd. 1984) (dictum), *rev denied* FCC 85-130, *appeal pending sub nom. Levin v. FCC*, No. 85-1255 (D.C. Cir. 1985).

[33] *See* e. g. *KCOP*, 37 RR2d 1051 (1976) recon. denied 39 RR 2d 965 (whether wrestling matches violate state law is for the State Athletic Commission to decide); *Kaiser Broadcasting Corporation*, 31 RR 2d 46 (1974) (conviction of applicant for antitrust violations relying on past decisions of legality then overruled was not disqualifying); *Sande Broadcasting Corporation*, 38 RR 2d 685 (1976) (criminal acts of shareholder did not require hearing where shareholder not involved in daily operations and removed from corporation prior to felony conviction); *Sunshine Wireless, Inc.*, 45 RR2d 1699 (1979) (five year old National Labor Relations board findings of failure to bargain do not impact renewal); *Abbey J. Butler*, 47 RR 2d 852 (1980) (grant without hearing denied where one transferee had signed securities law consent order, other transferee denied membership on a commodities exchange); *Tri-Cities Broadcasting*, 4 RR 2d 642 (Rev. Bd. 1965) (judgment against 10% shareholder for nonpayment of rent not conduct related to matters entrusted to the Commission); *D&E Broadcasting Co.*, 4 RR 2d 791 (Rev. Bd. 1965), 5 RR 2d 745 (1965) (whether or not applicant knowingly imported three horses into U.S. in violation of Tariff Act, the duty involved is only $19.50, he's not disqualified.

gious non-FCC misconduct, however, has apparently not in itself been found to disquality existing licensees, at least in the renewal context.[34] Thus Commission resources, and those of our applicants, have been spent in proceedings sometimes spanning decades, considering matters which, in any event, are not of themselves dispositive of action to be taken. Having fully considered the record on this matter as developed herein, and our experience with the *Uniform Policy*, we do not believe that the level of review of non-FCC misconduct called for by the *Uniform Policy* is justified.[35]

34. We believe that the non-FCC behavior of concern to us is that which allows us to predict whether an applicant has or lacks the character traits of "truthfulness" and "reliability" that we have found relevant to the qualifications to operate a broadcast station in accordance with the requirements of the Communications Act and of our rules and policies. Based on the record before us, we find it appropriate to focus generally on three types of adjudicated misconduct which are not specifically proscribed by the Act or our rules and policies: (1) fraudulent statements to government agencies; (2) certain criminal convictions; and (3) violations of broadcast related anti-competitive and antitrust statutes.

a. Fraudulent misconduct before a government agency

35. The concepts of "truthfulness" and "reliability" are, of course, closely related, as reliability includes the propensity to act consistent with one's representations. Thus, in the NOI the Commission noted that when it had "believed that an applicant's general integrity and future reliability were in doubt due to its past misrepresentations or lack of candor, the Commission has

but matter will be considered in comparative proceeding); *Bangor Broadcasting Corporation*, 23 RR 2d 883 (Rev. Bd. 1972) (Commission won't add issue as to possible unadjudicated violation of wage/price freeze); *Kenneth Harrison*, 35 RR 2d 911 (1975) (alleged state liquor law violations a matter for state courts).

[34] *RKO General, Inc.*, *supra* note 9, at 49, *aff'd, RKO General, Inc. v. FCC*, *supra* note 8, at 227. *See, also*, *Westinghouse I*, *supra* note 23; *General Electric Co.*, 45 FCC 1592 (1964); *Westinghouse Broadcasting Company*, 75 FCC 2d 736 (1980) (hereinafter "*Westinghouse II*"); *Miami Valley Broadcasting Corporation*, 78 FCC2d 684, 721-761 (1980), *vacated on other grounds*, 48 RR 2d 1065 (1980).

[35] We are not alone in holding such a viewpoint. *See*, for example, *Wilkett v. Interstate Commerce Commission*, 710 F.2d 861, 863-864 (D.C. Cir. 1983) (conviction of sole proprietor of trucking company for conspiracy to distribute a controlled substance and second degree murder no bar to determination that his company is fit to conduct motor carrier operations).

denied the application before it."[36] We have recently observed that misrepresentation "involves false statements of fact," while lack of candor "involves concealment, evasion, and other failures to be fully informative." However, we concluded that both misrepresentation and lack of candor "represent deceit; they differ only in form."[37] Deceit is equated with fraud.[38]

36. As we have noted, we do not believe that as a general matter non-FCC violations of law have sufficient relationship to the likelihood that an applicant will or will not in the future operate a broadcast station in compliance with the Commission's rules that these violations, adjudicated or not, should be considered in determinations on applicant qualifications. We are of the view, however, that there may be a sufficient nexus between fraudulent representations to another governmental unit and the possibility that an applicant might engage in similar behavior in its dealings with the Commission that non-FCC actions involving such behavior may be considered as having a potential bearing on character qualifications.[39] In this context, adjudications of both criminal and civil violations of law could be considered in which a specific finding of fraudulent representation to another governmental unit is made.

b. Criminal convictions

37. We also recognize that other types of non-FCC behavior may potentially bear on an applicant's character. In this regard, we believe that criminal convictions involving false statement or dishonesty could be relevant to predicting the propensity for an applicant to deal truthfully with the Commission.[40] Beyond

[36] NOI, *supra* note 1, at 847.

[37] *Fox River Boradcasting Company, Inc.*, 93 FCC 2d 127, 129 (1983).

[38] *Webster's New Collegiate Dictionary* 453 (1979). *See, also, Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454, 461-462 (D. C. Cir. 1980). AS to our action herein regarding the future treatment ofmisrepresentation or lack of candor to the Commission, *see infra* paras. 58-61.

[39] "Fraud connotes perjury, falsification, concealment, misrepresentation." *United States v. Nill*, 518 F.2d 793 (5th Cir. 1975), citing *Knauer v. United States*, 328 U.S. 654 (1946).

[40] We find that Rule 609 of the Federal Rules of Evidence is useful in identifying specific types of criminal misconduct which may be relevant to an applicant's character for truthfulness. While this rule is directed at the types of criminal behavior which may be used for witness impeachment purposes, we find it instructive in analyzing aspects of character relating to truthfulness and reliability in our regulatory scheme. Specifically, Rule 609(a)(2) permits the introduction of any criminal convictions, regardless of punishment, involving dishonesty such as perjury, criminal fraud and embezzlement. *See* Fed. R. Evid. 609(a)(2). We find this approach appropriate for our purposes.

convictions of crimes involving dishonesty, we also find that other serious crimes maybe potentially relevant in determining character qualifications. We are of the view, however, that criminal convictions not involving fraudulent conduct are generally not relevent to an applicant's propensity for truthfulness and reliability,[41] unless it can be demonstrated that there is a substantial relationship between the criminal conviction and the applicant's proclivity to be truthful or comply with the Commission's rules and policies.[42] In this regard we find it appropriate to consider only felony convictions. The burden of proving that a substantial relationship exists shall be on the party seeking admission of such evidence. We believe that this strict standard properly balances our concerns with the probity of such evidence and our need to

[41] *See Leflore-Dixie, Inc.*, FCC 85R-19, Mimeo No. 2864, released March 4, 1985, (Rev. Bd.) (no nexus shown between one principals' prior felony conviction of obtaining diet pills by using a forged physician's signature and applicant's current qualifications; and allegations of drug use by another principal did not warrant a hearing issue because no criminal proceeding had been instituted and no showing had been made that the past behavior had any predictive value in ascertaining the applicant's ability to comply with Commission rules); *Alessandro Broadcasting Co.* 56 RR 2d 1568, 1575 n. 13 (Rev. Bd. 1984) (conviction for second degree murder by an applicant's controlling shareholder did not warrant either disqualification or assessment of a substantial comparative demerit; since incident was remote in time and the individual was completely rehabilitated under local law, there was no predictive nexus between his past crime and his future fitness to be a Commission licensee); and *Central Texas Broadcasting Co.*, 51 RR 2d 1478, 1485-86 (Rev. Bd. 1982) (alleged violations of a state usury law and the Federal Age Discrimination Law, as well as a plea of *nolo contendere* to an indictment charging conspiracy to violate the federal antitrust laws, did not justify assessment of comparative demerits to competing applicants for a new TV station).

[42] We believe that our approach here is somewhat analogous to that found in section 609(a)(1) of the Federal Rules of Evidence. Pursuant to this rule, criminal felony convictions may be admissible only where the probative value of the evidence outweighs the prejudicial effect to a criminal defendant. In this regard, the Federal Rules recognize that the probative value of this type of evidence may not be sufficient to outweigh competing policy concerns in all situations. While proceedings before the Commission do not involve the rights of criminal defendants, other policy concerns such as undue delay, waste of administrative resources resulting from the presentation of evidence not directly applicable to our regulatory concerns justify our action herein. *See e. g.* Fed. R. Evid. 403. Our experience with criminal felony convictions that do not involve fraud or dishonesty persuades us that a strict examination of the relationship between the conviction and an applicant's propensity for truthfulness be conducted prior to designating a basic character qualifications issue for hearing. *See Alessandro Broadcasting Co. supra* note 41. In considering the threshold relevancy of these convictions, the Commission will evaluate factors such as the nature of the crime, its nearness or remoteness, and whether the individual has been rehabilitated. *See, e. g., Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967).

reduce unnecessary administrative delay in the hearing process.

c. Antritrust and Anticompetitive Commercial Practices

i. Issues

38. Another area as to which we inquired in the NOI was the proper treatment of misconduct by existing licensees in the form of fraudulent or anticompetitive station-related commercial practices. The Commission observed that we had historically been concerned with such unfair or fraudulent commercial practices as fraudulent billing, misleading coverage maps and network program clipping. These infractions, we remarked, "adversely affect a licensee's sponsors or business partners rather than the listening public." Thus, we contended, "a cogent argument can be made that such commerical misconduct should be left to private remedies in contract law or criminal fraud prosecution and that this Commission, with its limited resources, should not involve itself in policing these activities." The Commission suggested, however, that in an era of increasing reliance on marketplace forces to achieve public interest goals, fraud which negatively affects the marketplace might be a proper matter of consideration. Similarly, the Commission stated, "traditional anticompetitive behavior can have serious adverse consequences on the Commission's ability to rely on the comptitive marketplace." An applicant engaging in station-related anticompetitive conduct might undercut the Commission's traditional goal of diversity in information resulting from diversity of ownership.

ii. Comments

39. In this area, such commenters as CBS, NBC and ABC generally support relaxation of Commission consideration of both fraudulent commercial practices and anticompetitive commercial practices as matters affecting qualifications. ABC states that as a result of the Commission's approach to character, we have considered "a host of allegations" concerning violations of law unrelated to the Communications Act or our rules without ever inquiring, as a threshold matter, as to the relevance of such infractions to the likelihood that the applicant will be honest in its dealings with the Commission and operate its broadcast facility consistent with the Communications Act and Commission rules and policies. CBS argues that "however reprehensible certain commercial practices may be, they primarily affect a

licensee's advertisers and business partners," and not what listeners and viewers hear and see. CBS and NBC state that ample remedies, both private and governmental, are available to deter such misconduct.

40. Additionally, CBS argues that the marketplace will provide a significant deterrent to fraudulent business practices. For example, CBS states that with numerous broadcast and nonbroadcast media outlets available, advertisers will not long deal with stations engaged in fraudulent billing. NBC argues that as to anticompetitive practices, the Commission "has every reason to rely on the operation of the marketplace," as supplemented by the agencies and courts directly responsible for policing such practices. NBC comments that "[t]he basic assumption supporting deregulation is not that anticompetitive activity will never take place, but rather that the marketplace is generally competitively structured and will function properly in a system of competitive free enterprise."

41. In opposition to changing our present practices, commenters including Citizens, NCCB and BML contend that licensees involved in fraudulent commercial practices such as double billing are not living up to the high commercial standards expected of "fiduciaries for the public." Citizens argues that licensees who engage in such practices are "more likely to misrepresent and disobey laws in other areas that more directly impact the public." As to anticompetitive practices, Citizens states that the policy which has been established in the Communications Act and by the Commission and the courts[43] requires that applicants who have engaged in anticompetitive conduct in both broadcast and nonbroadcast areas "be scruntinized with extreme care for any propensity to duplicate such conduct as a broadcast licensee." Such propensity, states NCCB, "is especially incompatible with broadcasting in the public interest." Blair-Post/Newsweek state that practices such as fraudulent billing and network clipping, although they may affect parties other than the broadcast audience, can affect the public as well, as when network clipping removes a required sponsorship identification announcement. Blair-Post/Newsweek contend that as to certain "gray area" practices which may or may not relate to program performance,

[43] *Citing, inter alia, National Broadcasting Company v. United States*, 319 U.S. 190, 222–224 (1943); *Metropolitan Television Company v. FCC*, 289 F.2d 874, 876 (D.C. Cir. 1961); *Mansfield Journal Co. v. FCC, supra* note 28, at 33; Section 313 of the Communications Act of 1934, as amended; and "the legislative history of the Radio Act of 1927 and the Communications Act of 1934."

(and given "good faith doubt as to whether particular practices do reflect on broadcast qualifications"), the Commission should take cognizance only of those practices which have been "designated in rules, policy statements or adjudications as being relevant to evaluation of a renewal application."

iii. Conclusions Regarding Antitrust and Anticompetitive Commercial Practices

42. Initially, we are of the view that our examination of nonbroadcast commercial activity in the character context should be substantially revised.[44] Current policies require consideration of business activity that extends far beyond our specific regulatory concerns.[45] As we have observed previously, we no longer believe it appropriate to require the level of review of non-FCC activity currently required by the *Uniform Policy Statement*.[46] We find this analysis particularly persuasive in the context of nonbroadcast business misconduct, where the policies, concerns, and market incentives in other industries may be quite different from the broadcast industry. In this regard, anticompetitive activity in the nonbroadcasting context may not be predictive of an applicant's proclivity to be truthful and reliable.[47] Moreover, there is nothing in the Communications Act requiring a consideration of nonbroadcast related commerical activity in the context of our character determinations. In this regard, even adjudicated cases of anticompetitive activity, antitrust violations, or other types of nonbroadcast business misconduct would not necessarily be relevant to our specific concerns for truthfulness and reliability in the operation of a broadcast station.[48] Accordingly, with

---

[44] In this context non-broadcast activity describes business conduct which is not directly related to the business of broadcasting. Alternatively, broadcast related activity describes commerical activity which occurs in the course of operating or running a broadcast station.

[45] *See Uniform Policy Statement*, *supra* note 6, at 404. Indeed, the Commission's concerns with the monopolistic practice in other industries appears to have been originally founded on specific concerns with the monopolistic practices of the motion picture industry and its effect on the newly emerging television industry. *Id.* Such concerns are no longer appropriate in the current communications marketplace.

[46] *See supra* text at para. 33.

[47] The lack of predictability of nonbroadcast anticompetitive activity was amply demonstrated in the Commission's *Westinghouse I* decision. *See Westinghouse I*, *supra* note 23.

[48] We recognize our obligations pursuant to Section 313(b) of the Act relative to refuse a license or construction permit to applicants whose license has been revoked by the courts for antitrust violations. This section, however, does not require consideration of nonbroadcast antitrust activity in the character

respect to nonbroadcast related activity, we shall limit our character inquiry to those adjudicated violations discussed previously.[49]

43. We believe that where broadcast related business misconduct rises to the level of an adjudicated violation of their anticompetitive or antitrust laws, then the Commission could consider the activity relevant to an applicant's character. Generally, where alleged anticompetitive activity does not constitute a violation of state or federal antitrust or anticompetitive laws we will not pursue the matter. Unless the Commission has adopted a specific rule or policy prohibiting the commerical conduct at issue, we think licensees should not be penalized for engaging in activities that meet the requirements of law and that such conduct does not reflect upon their character. Although we once believed that the public interest standard warranted imposition of standards more stringent than those imposed by the antitrust laws, we no longer believe it is necessary to pursue matters that Congress itself has not seen fit to prohibit. For the most part, we believe that the potential to engage in monopolistic and anticompetitive practices is circumscribed in today's competitive market. However, we not that concerns with anticompetitive and antitrust activity in broadcasting have occupied a unique position in the Commission's regulatory scheme.[50] These concerns have been expressed not only in the context of specific rules, but also as elements in those areas involving discretionary determinations by the Commission.[51] Because of this unique position, violations

---

context where a court has failed to revoke an applicant's license. In this regard, we note that the Commission's primary responsibility has always been to promote competition in the broadcast industry. *See* 47 U.S.C. § 313(a)(1984) (all laws of United States relating to unlawful restraints and monopolies are applicable to radio); 47 U.S.C. § 311 (1950) *amended* Pub. L. No. 554, 66 Stat. 711 (1952) (section formerly required Commission to refuse to grant a license to any applicant found guilty by a Federal Court to have unlawfully monopolized radio communication even where the court did not revoke a license); 15 U.S.C. § 21 (granting authority to the Commission to enforce compliance with the Clayton Act where applicable to common carriers engaged in radio transmission of energy).

[49] *See supra* paras. 35-37.

[50] Indeed, concerns over potential monopolistic practices in broadcasting were a significant force behind the Communications Act and subsequent regulatory policies. *See e.g., National Broadcasting Co. v. U.S.* 319 U.S. 190, 222-224 (1943). *See also*: *Memorandum Opinion and Order* in Gen. Doc. 83-1009, 100 FCC 2d 74 (1985) (discussing competitive concerns in the rule making context).

[51] For example, in 1952 Congress amended § 311 of the Communications Act by striking language which had previously authorized the Commission to revoke a license where a licensee was found to be guilty of violating the antitrust laws regardless of whether the court ordered such revocation. In eliminating this provision, Congress noted that the Commission's authority to examine anti-

of anticompetitive and or antitrust laws in the broadcast context may have a potential bearing on an applicant's proclivity to comply with the Commission's rules and policies. As a result, we believe it is appropriate to distinguish broadcast related antitrust and anticompetitive behavior from other types of business misconduct for the purposes of determining an applicant's basic character qualifications.[52]

44. While such activity may have a potential bearing on the applicant's character, we do not believe it appropriate or necessary to engage in the initial investigation or enforcement of the antitrust laws.[53] As we have observed in the *Underbrush* proceedings, other government agencies — most notably the Department of Justice and the Federal Trade Commission — have been given primary responsibility in policing antitrust and anti-competitive activity.[54] In addition, individuals or corporations can bring lawsuits alleging violation of antitrust or anticompetitive laws. In this regard, we are of the view that, for the purposes of a character determination, consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility of policing such activity.[55] We find that this approach strikes an

---

trust activity in the character context was not changed by the amendment. *See* Sen. Rep. No. 44, 82 Cong. 1st Sess., January 25, 1951; *Communications Act Amendments*, Pub. L. No. 554, 66 Stat. 711 (1952).

[52] We recognize, of course, that our consideration of antitrust or anticompetitive violations in the context of broadcasting differs from the policy considerations which arise with antitrust or anticompetitive violations of other Commission licensees. In this regard, the policy concerns regarding tariffs and rate making may justify different treatment of these issues. *See* e.g. *Notice of Proposed Rulemaking*, in CC Docket No. 85-64, FCC 85-120, released May 3, 1985. Moreover, the Commission has recognized that the policies generally underlying our character inquiry in the broadcasting context are different from those which are raised in the common carrier context. *See Arizona Mobile Telephone Co.*, FCC 83-557, 52 RR 2d 1001, 1017-1018 (April 13, 1983). (Character considerations involving tax liens and judgments do not bear the same significance for CARs carriers as they would in broadcast proceedings).

[53] While the Commission has the authority to investigate anticompetitive activity which falls short of an adjudicated violation of the antitrust or anticompetitive laws, *See e.g., U.S. v. RCA*, 358 U.S. 334 (1954); *Philco Corp. v. FCC*, 293 F.2d 864 (1961), we do not believe that independent consideration of such misconduct is required by the Communications Act prior to an adjudication before an appropriate forum. We believe these decisions must be considered in the context of the Commission's regulatory posture at that time. In this regard, we view the Court's statements concerning consideration of unadjudicated antitrust allegations as affirming the Commission's previous regulatory scheme and not as a statutory requirement.

[54] *See infra* para. 45.

[55] In this regard, we note that our consideration will include violations of the

appropriate balance between the need to consider the relevancy of such activity, our desire not to duplicate the adjudicative functions of the courts of other government agencies and our concern with the basic fairness of our proceedings to participating litigants.

d. Underbrush considerations

45. In the past several years, the Commission has undertaken, in its broadcast "Underbrush" proceeding in MM Docket 83-842,[56] a systematic review of those policies and rules which were "no longer warranted or required by the public interest." In eliminating certain of these policies the Commission stated that it would no longer consider certain areas of misconduct in the first instances but rather that such matters should be treated by more appropriate governmental agencies or the courts. In so doing, however, the Commission acknowledged that it may consider the impact of adverse agency or judicial findings regarding the practices in question upon an applicant's character qualifications[57] and, further, left open to this instant character proceeding the ultimate effect to be given to any such adverse adjudications

---

Sherman Antitrust Act, Clayton Antitrust Act, Robinson-Patman Act, Federal Trade Commission Act as well as similar state antitrust and anticompetitive statutes.

[56] *See, generally, Elimination of Unnecessary Broadcast Regulation*, FCC 83-339, 48 Fed. Reg. 36254 (August 10, 1983) (hereinafter *Underbrush* I); *Elimination of Unnecessary Broadcast Regulation and Inquiry into Subscription Agreements Between Radio Broadcast Stations and Music Format Companies*, MM Docket No. 83-842 and No. 19743; FCC 83-375, 48 Fed. Reg. 49852 (October 28, 1983) (hereinafter *Underbrush II*); *Notice of Proposed Rule Making* in MM Docket No. 83-842, FCC 83-376, 48 Fed. Reg. 49879 (October 28, 1983); *Report and Order* in MM Docket No. 83-842, FCC-388, 49 Fed. Reg. 33264 (August 22, 1984) (hereinafter *Underbrush III*); *Policy Statement and Order* in MM Docket No. 83-842, FCC 85-24, 50 Fed. Reg. 6264 (February 14, 1985) (hereinafter *Underbrush IV*); *Policy Statement and Order* in MM Docket No. 83-842, FCC 85-25, 50 Fed. Reg. 5583 (February 11, 1985) hereinafter *Underbrush V*); and *Second Notice of Proposed Rule Making* in MM Docket No. 83-842, FCC 85-26, 50 Fed. Reg. 5792 (February 12, 1985) (hereinafter *Underbrush VI*).

[57] Examples of formerly proscribed activity which could possibly result in adjudications by other tribunals would be improper use of coverage maps (formerly Sec. 73.4090); improper use or distortion or audience ratings (formerly Secs. 73.4035 and 73.4040); promotion of nonbroadcast business (formerly Sec. 73.4225); etc. We note, however, that not all of the policies eliminated in the Underbrush proceedings would necessarily trigger liability under other laws, in that they were FCC-created and have no counterparts in other laws. For example, elimination of our policies with respect to foreign language broadcasts, music format service agreements, repetitious broadcasts, off network programs, polls and sirens or sound effects in advertising would not generally trigger liability under other laws. *See Underbrush II.*

involving once proscribed activities.[58]

46. Accordingly, we shall here set forth our conclusion with respect to this matter. Engaging in underbrush type activities may give rise to various causes of actions both civil and criminal. We do not find it necessary or appropriate to expand upon the range of relevant non-FCC behavior described above. Because engaging in those activities are no longer specifically proscribed by our policies, we will consider the misconduct as being relevant to an applicant's character qualifications only where there has been an adjudication and that adjudication falls into one of the above described categories of non FCC behavior. For example, engaging in ratings distortion could be considered relevant to an applicant's character to the extent that it rose to the level of an adjudicated violation of the antitrust or anticompetitive laws. Such activity may also be considered if it resulted in a criminal conviction or an adjudication of fraud before another government agency. Of course where such activity constitutes a violation of existing rules and policies then such misconduct would be considered as FCC related behavior.

47. If in the future the Commission decides to eliminate policies relating to business practices, than at that time, such practices would be treated no differently than other non-FCC misconduct for character purposes. We do not believe any parties have made a showing that broadcasters should be subject to extraordinary penalties through the licensing process absent a Commission finding that our direct control of such practices is necessary to the regulatory scheme.[59]

e. Other matters concerning non FCC misconduct

48. It is our current practice to ordinarily to refrain from taking any action on non-FCC misconduct prior to adjudication by

[58] In this connection, *see, also, Amendment of Section 73.1202(b)(2) of the Commission's Rules — Additional City Identification*, 48 Fed. Reg. 51302 (1983), at paragraph 13, n. 6.

[59] At the present time, the Commission has before it a *Second Notice of Proposed Rulemaking* involving its rules concerning fraudulent billing, network clipping and joint sales policies. *See Second Notice of Proposed Rulemaking* in MM Docket No. 83-842, FCC 85-26, 50 Fed. Reg. 5792 (February 12, 1985). Thus, participating in these types of misconduct would be considered as FCC related behavior. However, if these specific directives were eliminated, then such misconduct could be relevant to an applicant's character only to the extent that it falls into one of the specific categories of non-FCC behavior described above. The present proceeding in no way prejudges the outcome of this pending matter.

another agency or court.[60] In the future, our current practice will be our actual policy. We will not take cognizance of non-FCC misconduct involving criminally fraudulent misrepresentations, alleged criminal activity and antitrust or anticompetitive misconduct unless it is adjudicated.[61] In this regard, there must be an ultimate adjudication by an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations.[62] Such adjudications will be considered for character purposes during the pendency of an appeal.[63] In addition, consent degrees will not be considered as adjudicated misconduct for the purposes of assessing an applicant's character.[64] Finally, we will not take cognizance of these

---

[60] The Commission acknowledges that there may be circumstances in which an applicant has engaged in nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation. *See e.g., supra,* comments of ABC at note 29. Such misconduct might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body. The Commission cannot presently contemplate the manner in which circumstances might arise, and stresses that such considerations would come into play only with regard to a specific application involving specific misconduct.

[61] The Commission recognizes that there may be circumstances in which an applicant has engaged in repeated, willful violation of law amounting to a flagrant disregard for complying with the law. Such adjudicated misconduct might, of its own nature, provide sufficient evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee. In the rare instances where the Commission is confronted with such a record, consideration should be given to the circumstances surrounding the violations. In this regard, we believe that not only must there be a pattern of adjudicated violations, but the types of violations must reflect a significant departure from established legal authority. Moreover, the applicant must have either actual knowledge that the conduct constitutes a clear violation of existing law or the nature of the violation itself must give rise to a irrefutable inference that the applicant knew it was violating the law. In making these determinations it may be appropriate to consider whether the violation resulted from an incorrect legal interpretation or whether the violation represented a knowing decision to ignore legal authority.

[62] We believe it appropriate to consider only those adjudications made by an ultimate trier of fact. Tribunals whose factual determinations may be reviewed *de novo* will not be considered unless the time for taking such review has expired under the relevant procedural rules.

[63] In the appropriate circumstances, we may condition any Commission action on the outcome of an appeal. The impact of an appeal on an applicant's character determination will depend, *inter alia*, on a consideration of the issues which are the subject matter of the appeal. *See* Fed. R. Evid. 609(e).

[64] We do not believe it appropriate to consider consent decrees, entered into in the civil context, for the purpose of determining character qualifications. The act of consenting to such an agreement is not a wrongful act and does not necessarily imply wrongful conduct. The existence of a consent decree, by itself, is not necessarily probative on the issue of an applicant's character. *See Katy Communications* 87 FCC 2d 764 (1984). With regard to convictions based on a

adjudicated non-FCC acts as to any individual or entity whose ownership or positional interest in an applicant is not cognizable under our multiple ownership rules. Those interests which are believed by the Commission to have the potential to influence or control the operations of a station are recognized and attributed under the multiple ownership rules. We see no reason to consider as bearing on character qualifications the participation in an applicant of an individual or entity whose stake in the applicant is otherwise seen as inconsequential with regard to the potential to influence station operations.

49. The Commission finds no basis upon which to treat new nonlicensee applicants differently than existing broadcasters with regard to the scope of consideration given non-FCC misconduct.[65] We do not believe it reasonable to go beyond the above mentioned limits and treat other misconduct which we have deemed irrelevant to the character qualifications of existing broadcasters as bearing upon the character of new nonlicensee applicants simply because no other evidence is available. Thus, the same policy will apply to new nonbroadcaster applicants as to existing broadcasters. While the Commission understands Citizens' and UCC's concerns regarding the complexity of forfeiture and revocation proceedings, we conclude that the costs imposed by such proceedings in the limited instances in which they might be found necessary are clearly outweighed by the benefits of avoiding regular, inappropriate reviews of an applicant's non-FCC misconduct. In this regard, we believe that our revocation proceedings will serve as an appropriate remedy in those situations where the misconduct has been adjudicated.[66] We note that the processing of the errant broadcaster's first renewal application will also afford the opportunity to consider any problems in broadcaster operations. Given that we will continue to consider adjudicated non-FCC misconduct as to both new applicants and existing broadcasters before a government agency, we will not at this time

plea of *nolo contendere*, however, we are of the view that such convictions could be considered relevant for the purposes of our character examination. *See U.S. v. Williams*, 642 F.2d 136 (5th Cir. 1981).

[65] While the scope of relevant non-FCC behavior is the same for both new licensees and existing broadcasters, the ultimate significance of such misconduct may be different. For example, an incumbent's past record of compliance with our rules may, in certain circumstances, be balanced against any non-FCC misconduct. *See infra* at para. 102.

[66] Our focus on adjudicated misconduct does not limit the Commission's discretion to condition the grant of a license or permit on the outcome of related court or government agency proceeding, where such action is deemed appropriate.

delete from Commission broadcast application forms all questions regarding adjudicated non-FCC misconduct. The questions will, however, be appropriately modified.

50. In taking action herein, we are mindful of the *dicta* in *Community Television of Southern California v. Gottfried*[67] in which the Court suggested that the Commission would be obligated to consider the possible relevance of an adjudicated violation of *any* Federal statute by a licensee "in determining whether or not to renew the lawbreaker's license." In making this statement, the Court referred to the Commission's own explanation of our past policy. It therefore appears that the Court's statement is reflective of our policy rather than a definitive judicial determination that such Commission review is required. Similarly, we are aware that cases such as *TV-9, Inc. v. FCC*,[68] suggest that basic character qualifications may be put in issue even by unadjudicated violations of [criminal] law. We find merit to the view expressed in NAB's comments that the Court's statement in *TV-9* was made "in the context of the Commission's traditional policies on character qualifications," and was not an adjudication of whether the Communications Act permits or warrants new and different policies. We view related judicial holdings in a similar manner.[69] The propriety of making changes in the manner in which the Commission exercises its authority in the licensing process has long been recognized by the Courts, it being acknowledged that "experience often dictates change."[70]

51. While it has been held that "an agency charged with promoting the 'public interest' in a particular substantive area may not simply 'ignore' the policies underlying other federal statutes,"[71] it has also been determined that "the use of the term 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation."[72] Thus, while it may be appropriate for the Commission to consider the relationship of the policies underlying other Federal statutes to effectuation of the policies behind the Communications Act, the inclusion

[67] 459 U.S. 498, 103 S. Ct. 885, 74 L. Ed. 2d 705, 716 (1983).

[68] 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

[69] *See*, for example, *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 45, 52 (D.C. Cir. 1978) ("*Central Flordia I*").

[70] *Pinellas Broadcasting Company v. FCC*, *supra*, note 18 at 206.

[71] *McLean Trucking Co. v. United States*, 321 U.S. 67, 80 (1944), as discussed in *Community Television of Southern California v. Gottfried*, *supra* note 67, at 716.

[72] *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976) (hereinafter *"NAACP v. FPC"*).

of a public interest standard in the Communications Act did not automatically given the Commission "either the authority or the duty to execute numerous other laws."[73]

52. As a general proposition it is clear that we have the discretion to decide whether to approach these matters through rulemaking, individual adjudication, or a combination of the two.[74] Issuance of the instant *Policy Statement* as guidance certainly falls within the bounds of this discretion. Thus, it appears fully within our authority to determine in the instant proceeding that only a relatively focused inquiry of non-FCC misconduct will be considered in the future as bearing on character qualifications, and that such misconduct must have been adjudicated by an appropriate agency or court before Commission consideration will occur. It is our determination that it is this range of non-FCC misconduct which, for character qualifications purposes, is relevant to the regulatory purposes of the Communications Act.[75]

4. Issues Regarding FCC-Related Misconduct

53. In the previous section of this document, we discussed the types of non-FCC misconduct which might be considered as raising questions regarding an applicant's character qualifications. Attention must also be given to the manner in which FCC-related misconduct of those with a record as licensees will be treated for qualifications purposes.

a. Violations of the Communications Act, Commission Rules and Policies

54. In the past, the Commission has in its decisions described the import of violations of the Communications Act or our rules and policies other than those bearing on citizenship and technical qualifications in several different ways. While some infractions have in fact been discussed as bearing on "character qualifications", others have been described as having an impact on the applicant's fitness." Some violations have been said to bear on

---

[73] *Id.*

[74] *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947).

[75] This is not to say that the Commission will not consider the relationship to the Communications Act of other Federal statutes not involving such misconduct, but only that such considerations should ordinarily occur in the rulemaking context rather than in the contemplation of character qualifications issues in individual cases. Should our future experience indicate that we have erred herein in narrowing the range or non-FCC misconduct to be considered for character purposes, we would of course be prepared to revisit this issue.

"qualifications," but the type of qualifications in question has been left unidentified.

55. In this *Policy Statement*, the Commission has determined that the relevant character traits with which it is concerned are those of "truthfulness" and "reliability." Regardless of the manner in which we have historically described the matters before us, our concerns when reviewing FCC-related misconduct in the licensing context have clearly had a relationship to those two traits; we have questioned whether the licensee will in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's Rules and policies.

56. From this perspective, it appears 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 qualifications. As noted in paragraph 26, *supra*, in the NOI we specifically solicited comment as to whether violations of the Act or our rules or policies should bear on the qualifications of existing licensees. The thrust of the comments received is that these are matters which are predictive of licensee behavior and directly relevant to the Commission's regulatory activities. Thus, we will in the future treat violations of the Communications Act, Commission rules or Commission policies as having a potential bearing on character qualifications.

57. As indicated in paragraph 26, *supra*, in the NOI we also raised specific questions as to whether such FCC-related misconduct as "misrepresentation or lack of candor to the Commission, deception or defrauding of the broadcast public, and abuse of broadcast facilities through fraudulent or anticompetitive commercial practices" should be considered as qualifications issues bearing on an applicant's likely future broadcast performance. We believe it appropriate to give misrepresentation specific consideration in the context of this *Policy Statement*. 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. Other types of FCC-related violations, although appropriately treated as possibly predictive of future behavior, are not as proximately relevant to the core concern of truthfulness as is the act of willful misrepresentation. Thus, with regard to this larger class of FCC-related violations we find it appropriate and sufficient to treat any violation of any provision of the Act, or of our Rules or

policies, as possibly predictive of future conduct and, thus, as possibly raising concerns over the licensee's future truthfulness and reliability, without further differentiation.[76]

b. Misrepresentation or Lack of Candor to the Commission & Abuse of Process

i. Issues Raised

58. In the NOI, the Commission observed that "our scheme of regulation rests upon the assumption that applicants will supply [the Commission] with accurate information." We remarked that "[d]ishonest practices threaten the integrity of the licensing process," and requested comment on whether misrepresentation and lack of candor should continue to be viewed "as serious breaches of the trust we should place in the broadcaster."

ii. Comments on Misrepresentation

59. A variety of responses to this inquiry were received. While commenters generally agree that these matters should continue to be considered, a number of commenting parties argue that misrepresentations which are not significant should not lead to denial of license. BML expresses surprise that the Commission even questioned whether it should continue to consider misrepresentation or lack of candor as breaches of trust.

iii. Conclusions Regarding Misrepresenation

60. As we have stated, the trait of "truthfulness" is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.[77] While the Commission has considered mitigating factors, if any, in drawing conclusions regarding the treatment of misrepre-

[76] Although we intend to treat any violation of FCC statutory or regulatory requirements as raising character concerns, not all violations are equally predictive. As discussed more fully *infra*, the nature of the violation, the circumstances surrounding it, and other pertinent considerations may attenuate or amplify its relevance to considerations of future reliability and truthfulness.

[77] "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *FCC v. WOKO*, *supra* note 10, at 227. *See, also, Leflore Broadcasting Company, Inc. v. FCC*, *supra* note 38, at 461–462.

sentation in a case,[78] the choice of remedies and sanctions is an area in which we have broad discretion.[79]

61. We believe it necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the commission's processes cannot be maintained without honest dealing with the Commision by licensees. Given the broad discretion in this area allowed us by the case law, we are understanding of broadcaster desires that "immaterial" misrepresentation not lead to disqualification. While we do not believe it appropriate to renounce the authority we possess in this area, Commission policy will ordinarily be to consider all the facts of a case in making decisions as to the disposition of matters involving misrepresentation or lack of candor.[80]

iv. Conclusions Regarding Abuse of Process

62. As we suggested in the NOI, at 847, n. 35, such misconduct as the filing of strike applications and harrassment of opposing parties, which threatens the integrity of the Commission's licensing processes, will also continue to be considered as bearing on character. Willful or repeated violation of the Commission's *ex parte* rules also falls within this "abuse of process" area.

c. Deceptive or Fraudulent Programming

i. Issues

63. Another topic specifically addressed in the NOI is the Commission's concern that "broadcasters do not abuse the licensing privilege conferred on them through deceptive or fraudulent programming." Deceptive or fraudulent programming, the Commission commented, goes to the essence of the trust placed in a broadcaster to provide quality service oriented to the needs of its community. Thus, we tentatively concluded that "such unethical broadcasting conduct as fraudulent contests, deceptive adver-

[78] *See*, for example, *Janus Broadcasting Company*, 78 FCC 2d 788, 791-793 (1980).

[79] Further, in cases of misrepresentation we are not required to consider the station's past program performance. *Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580, 583-584 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971), *See, also*, *Independent Broadcasting Co. v. FCC*, 193 F.2d 900, 903 (D.C. Cir. 1951), *cert. denied*, 344 U.S. 837 (1952).

[80] *See supra*, text at para. 35, as to the treatment to be given misrepresentation or lack of candor before another unit of government. *See infra*, paras. 115-118, regarding our action as to BC Docket No. 78-108.

tising, news staging and news distortion" should continue to be treated as "adverse reflections on an applicant's qualifications to serve the public interest." However, we questioned whether all such misconduct should be given equal weight in evaluation of a renewal applicant's qualifications, and asked whether matters involving such misconduct as deceptive advertising should be referred to other agencies rather than scrutinized in Commission proceedings.

ii. Comments

64. Comment specifically directed to the deceptive and fraudulent programming area was somewhat limited. CBS believes that it might be appropriate for the Commission to consider a broadcaster's knowing presentation of deceptive advertising or other deceptive programming as a renewal matter, but stresses that the broadcaster "should not be expected to function as a mini-FTC." NBC comments that a broadcaster's alleged involvement "in a persistent pattern of widespread and willfully deceptive programming could well have a direct impact on its service to the public," and thus could be relevant in the renewal context if it was undertaken "with the knowledge and approval of management" and no remedial steps were taken to avoid recurrence. BML takes the position, however, that merely by asking the questions cited in paragraph 30 above, the Commission can "invite licensees to adopt a marginal standard of conduct" rather than a standard commensurate with licensees' status as "fiduciaries for the public." BML states that the Commission's question regarding the possibility of weighing different misconduct differently "leads to a Talmudic dissection of whether one kind of fraud is better than another."

iii. Conclusions Regarding Deceptive or Fraudulent Programming

65. Having again considered our earlier, tentative conclusions in this area, the Commission remains convinced that the manner in which we currently treat such broadcaster misconduct as fraudulent contests[81], news staging and news distortion[82] should not be modified at this time. Because we have retained these

[81] *See, for example, Janus Broadcasting Company, supra* note 78. *See, also,* Section 73.1216 of the Commission's Rules.

[82] *See, for example, American Broadcasting Companies, Inc.*, 52 RR 2d 1378 (1982); *Walton Broadcasting, Inc.*, 78 FCC 2d 857 (1980). *See, also, Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981).

specific policies, engaging in such behavior will be considered as FCC related misconduct. We believe it necessary to continue to weigh such matters as the involvement of station management in the acts in question, and attempts to prevent recurrence of improper activity and other acts taken in mitigation of such acts, on a case-by-case basis.[83] It appears necessary that the facts of each case be separately considered. While this weighing process will include consideration of the significance of the particular act in question, we do not, upon reflection, believe it possible or appropriate to establish a detailed schedule of weights or differential treatment to be accorded particular types of improper conduct.

66. As to deceptive advertising, we concur in CBS' view that there must be a knowing presentation of such material by the broadcaster in order for the action to be considered a licensing qualifications matter. Thus, there must in some fashion be active participation of the broadcaster in perpetrating the deception upon the audience, either by its actual involvement in the knowing creation of a deliberately fraudulent ad or by awareness of Federal Trade commission ("FTC") or other final governmental action involving the advertisement in question. Complaints which require determinations as to whether certain advertising actually is fraudulent will, as has been our practice, ordinarily be referred to the FTC in the first instance. The question of whether a licensee knowingly participated in creation of a deliberately fraudulent ad maybe similar to that of deceptive programming, and may normally be acted upon directly by the Commission. Of course the Commission retains discretion to refer such matters to the FTC as appropriate. We find this approach consistent with the Commission's recent action in *Underbrush V* where the unreasonably burdensome investigatory requirements imposed on broadcasters pursuant to former Sec. 73.4040 were eliminated.[84]

67. We note, however, that the Commission recently eliminated, in its Underbush proceedings, certain other policies which may be considered similar to deceptive or fraudulent programming. In this regard, we note that any type of programming, including those types of programs such as astrology programs, foreign language broadcasts, etc., could be presented in a manner which would run afoul of our existing prohibitions against news distortion or fraudulent programming. To the extent such programming is used in a manner inconsistent with those policies

[83] For further discussion of these issues, *see infra* paras. 78 and 102-106.
[84] *See Underbrush V, supra* note 56.

regarding news distortion, news staging or fraudulent advertising, we could consider such activity as FCC misconduct. Alternatively, if such activity were not used in a manner inconsistent with these stated policies, but resulted in an adjudicated violation of the type previously discussed under non-FCC misconduct, then the behavior could be considered relevant to an applicant's character.

C. Misconduct by Corporate Applicants

1. Questions Regarding Corporate Applicant Misconduct

68. A major area of concern in the NOI was misconduct by corporate applicants. In its fourth question, the NOI asked:

> "(d) How should the Commission treat misconduct by a corporate applicant?"

The Commission observed in the NOI that we had historically held "corporate licensees responsible for the behavior of those individuals who operate them."[85] We noted, however, that unlike a sole proprietorship or partnership, in which the owners are often involved in the daily operation of the station, corporate shareholders frequently place their trust in officers and directors to actively manage their broadcast investments. Further, the individuals who are officers, directors and shareholders may all change, yet the corporate entity will continue. We stated that this flux made it difficult to ascribe a "character" to a corporation. However, we noted that Commission policy nonetheless holds that we might "find that a corporate applicant lacks character and deny its application, when the individuals incorporate management technically responsible for any misconduct have long since departed."

69. The Commission stated that as existing policy might "punish" innocent shareholders, we were soliciting comment as to whether corporate misconduct might be "neutralized" if those managers responsible for corporate misconduct are removed. The Commission also asked for comment on how, if we adopted such a policy, we might act to prevent corporate owners from delegating all responsibility for station operation to employees, thus avoiding knowledge of or responsibility for what occurred. We further questioned what action should be taken in instances in which "the corporate managers who are responsible for wrongdoing are also

[85] Citing *Independent Broadcasting Co.*, 43 F.C.C. 492, 494 (1950).

the controlling stockholders of the corporate licensee."

70. Finally, the Commission requested comment on "whether corporate licensees should be made to answer for the bad acts of controlling corporate entities, their management and their principals when that misconduct is relevant to the licensee's broadcast operations." In this regard, we tentatively concluded that the crucial factors were whether the controlling company exerted or might exert significant influence over the broadcast operations in question, and whether "the controlling company previously has involved the broadcast subsidiary in improprieties."

2. Comments on Corporate Misconduct

71. In the comments received in response to these questions, the threshold issue raised is the type of corporate conduct to be considered relevant to Commission character qualifications. A related point is the level of corporate operations at which the misconduct occurs. Thus, such parties as CBS, NBC, ABC, Tribune, American Legal Foundation ("ALF"), "Station Licensees"[86] and Blair/Post-Newsweek generally believe the Commission should not consider nonbroadcast corporate misconduct as bearing on qualifications. With regard to the parent/subsidiary relationship, AFC comments that misconduct by any of its 450 employees engaged in the insurance business in Japan could not possibly affect the operation of its broadcast stations.

72. "Station Licensees" expand upon this point by noting that the Commission has held "that it will not deem nonbroadcast misconduct by a licensee to be material if it occurred in corporate activity unrelated to the corporation's broadcast facilities." "Station Licensees" ask that we affirm the policy applied in 1980 in *Westinghouse II, supra,* in which a parent corporation was involved in "criminal representations to agencies of the federal government" other than the Commission. In that case, the Commission held that the parent corporation's misconduct was not material to an assessment of the broadcast subsidiary's qualifications to be a licensee, given the lack of criminal involvement of parent corporation personnel in a position to influence the broadcast subsidiary, and lack of the parent's involvement in the broadcast subsidiary's daily operations.[87]

---

[86] "Station Licensees" are a group of licensees represented by the law firm of McKenna, Wilkinson & Kittner. The composition of the group is fully set forth in Appendix "A".

[87] "Station Licensees" find this decision consistent with such earlier cases as *General Electric Co., supra* note 34 and *Westinghouse I, supra* note 23.

73. NCCB concurs in the view that where wrongdoing occurs in a separate subsidiary and does not involve the parent corporation's top management, it should not affect the broadcast subsidiary. A similar stance is taken by UCC. However, NCCB urges that wrongful activity by a parent corporation itself be considered "as predictive of misconduct involving the broadcast subsidiary." Both NCCB and Citizens state that such matters as the existence of interlocking officers or directors and the degree of integration of subsidiary/parent operations are factors to be considered in determining whether the parent's behavior will have a negative impact on the subsidiary's broadcast operations.[88]

74. As to the manner in which conduct of individuals associated with the licensee is to be treated, several commenters state that there are a number of factors involved which must be considered on a case-by-case basis. For example, AFC suggests that if a station manager is involved, such factors as the care used in his or her selection, "the extent and sufficiency of safeguards used in supervising station operation and preventing wrongdoing," possible prior knowledge or subsequent ratification of misconduct by corporate officers, and those steps, including removal of the wrongdoer, taken to remedy the misconduct or prevent recurrence are all factors to be considered. Similarly, "Station Licensees" state that whether the employee misconduct was contrary to management instructions is a relevant consideration.[89] However, CBS argues that licensees should not be expected to routinely remove personnel, absent some judgments, at least within the corporation, as to their responsibility for the improprieties. CBS states that "[i]f a contrary approach is followed, licensees may feel pressured to remove executives not because of their own evaluation that they have been guilty of wrongdoing, but out of fear that the Commission may take a different view and draw negative inferences from the licensee's failure to take 'prompt' action to dismiss those employees." A number of parties argue that any misconduct being considered should, as is currently the case, be balanced against the broadcast record of an existing licensee as the Commission makes its decision.

75. Citizen's contends that removal of the management responsible for the misconduct in question is an inadequate deterrent to future misconduct and an inadequate punishment for present

[88] Both Citizens and NCCB cite the Commission's approach in *RKO General, Inc.*, *supra* note 34, as an example of the manner in which such situations should be addressed.

[89] Other parties with similar views include NBC and NRBA.

misdeeds, although it finds that on rare occasion removal of the offending employees may be enough to protect the public interest. UCC observes that the principals of a station are responsible and should not be able to shift that responsibility by pointing a finger at an aberrant employee. NCCB argues that the Commission should not allow "neutralizing" of misconduct if the individual in question is a majority stockholder, stockholder and director, or otherwise in *de facto* control of the corporation, while NBMC states that qualifications of individual stockholders, officers and directors cannot be separated from those of the corporation, as they are deemed the alter ego of the corporation. NBMC contends that the mere fact that management has changed or seemingly innocent individuals will be affected should not immunize the corporation from the consequences of misconduct.

3. Conclusions on Corporate Applicant Misconduct

a. Types of Misconduct To Be Considered

76. It is the Commission's intention that applicants be treated as consistently as is possible with respect to character qualifications, with the minimum necessary regard given to the legal form in which they do business. Thus, we find as an initial matter that the same types of misconduct should be considered when corporate applicants are involved as when the applicant is a sole proprietorship or partnership.[90] The same violations of the Communications Act, Commission rules or Commission policies and adjudicated cases of relevant non-FCC misconduct have a bearing on the qualifications of an applicant entity regardless of the form in which it does business.[91]

77. It is clear that an adjudicated finding against the applicant itself would meet this test. However, a more difficult question concerns the relationships between individual and corporate misconduct. As we indicated in the NOI, and as the comments make clear, the determination of how to treat misconduct, both FCC-related and non-FCC related, when the actual wrongdoer is, variously, an applicant's employee, officer, director or shareholder, the parent corporation of the applicant (or any of the parent's personnel), or another subsidiary of a common parent (or the

[90] *See* paras. 1-67.

[91] It is, however, the case that "corporate misconduct often can be cured by replacing management and directors, whereas individual malfeasants may not so easily change their spots." *RKO General Inc. v. FCC, supra* note 34 at 227, n. 33.

subsidiary's personnel) is a more complex task.

b. Employee Misconduct

78. A corporation must be responsible for the FCC-related misconduct occasioned by the actions of its employees in the course of their broadcast employment.[92] To hold otherwise would, *inter alia,* encourage corporate owners to improperly delegate authority over station operations in order to "neutralize" any future misconduct. Our review of the record leads us to conclude that (as to both FCC and non-FCC misconduct) mitigating factors must be considered on a case-by-case basis. Thus, whether the effect of misconduct can be tempered by removal of the managers responsible for the wrongdoing in question involves numerous considerations, including the care taken by the applicant prior to occurrence of the misconduct in question, including any special training given.[93] Merely standing back and waiting for disaster to strike or for the Commission to become aware of it will not insulate corporate owners from the consequences of misconduct. While we agree with CBS that licensees should not be expected to remove personnel without some internal judgments regarding responsibility for improprieties, we note that any internal investigations must be conducted with dispatch. As we indicated in paragraph 75, it is our intention to treat licensees consistently with respect to character qualifications. Thus, wrongdoing by corporate managers who are also controlling stockholders will be treated as though the individuals involved were sole proprietors or partners.

C. Parent-Subsidiary Relationships

79. As to the parent/broadcast subsidiary relationship, we agree with "Station Licensees" that such situations as that found in *Westinghouse II, supra,*[94] should not be deemed relevant to the broadcast subsidiary's qualifications to be a licensee. As a general

[92] Non-FCC misconduct will be considered in those circumstances discussed previously.

[93] Clearly, innocent shareholders will not in all cases have their investments protected under this scheme. Such shareholder exposure to risk appears unavoidable. See, in this regard, *Independent Broadcasting Co. v. FCC, supra* note 85. However, responsible shareholder efforts will be recognized. *See WIGO, Inc.*, 85 F.C.C. 2d 196, 207-213 (1981).

[94] *See* para. 69, *supra. See, also, Cowles Broadcasting,Inc.*, 86 F.C.C.2d 993, 997-1002 (1981), *aff'd sub nom., Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 508, n. 29 (D.C. Cir. 1982), *cert. denied*, 203 S. Ct. 1774, 76 L.Ed. 2d 346 (1983) ("*Central Florida II*").

matter, however, if a close ongoing relationship between the parent and the subsidiary can be found, if the two have common principals, and if the common principals are actively involved in the day-to-day operations of the broadcast subsidiary, we will then consider the significance of the relationship of the non-FCC misconduct to the operation of the broadcast subsidiary. In this regard, we will focus on the actual involvement of the common principals in both the misconduct and in the day to day activities of the broadcast subsidiary. This standard will also be employed where the non-FCC misconduct of a non-broadcast subsidiary is being imputed to the parent corporation. In this context, however, we will consider mitigating factors similar to those described in paragraph 78 above. In addition, if the corporate parent is in any way involved in FCC-related misconduct, whether or not such misconduct involves the broadcast subsidiary, the bearing of that misconduct on the subsidiary's qualifications would be considered.[95]

80. Question remains as to the treatment of wrongdoing by an employee, officer, director or shareholder of the parent corporation. With regard to non-FCC misconduct, we find it appropriate to follow the procedure determined to be proper for other broadcast applicants. Further, the individual involved in such acts must have an interest in the parent corporation which is recognized and attributed under the multiple ownership rules.[96] If the individual's role in the parent is not such as to confer an attributable interest, the Commission finds no basis on which to consider his or her nonbroadcast actions for character purposes. Finally, the individual must actually be involved in some fashion in the day-to-day operations of the broadcast subsidiary.

81. If these conditions are met, the Commission will consider the impact, if any, of the individual's relevant adjudicated non-FCC misconduct on the qualifications of the broadcast subsidiary. We find that FCC-related misconduct of those individuals associated with the parent corporation and also involved in subsidiary operations, occurring in the course of their employment, (whether or not involving a broadcast subsidiary) raises sufficient question regarding the subsidiary's qualifications so that such matters will receive consideration. In such cases, the

[95] As discussed, *infra* at paras. 103–107, that the misconduct has occurred is not of itself dispositive of the final action to be taken by the Commission. Various other aspects of station operations must also be considered. As to the impact of FCC-related misconduct on other FCC-regulated services, *See Cablecom-General, Inc.*, 87 F.C.C. 2d 784 (1981).

[96] *See supra*, at para. 48.

Commission finds that holding of an attributable interest by the individual is not necessary. While the impact of the individual's actions on daily broadcast operation may have been limited, the involvement of the individual in broadcast activity may raise a character question and warrants at least some exploration. Such factors as corporate efforts to remove the miscreant prior to Commission awareness of the wrong committed and to prevent recurrences will, of course, be considered in mitigation.

d. Related Subsidiary

82. Engaging in the previously described non-FCC misconduct at a related subsidiary which results in an adjudication as to the subsidiary itself will require that there be principals shared with the broadcast subsidiary in order for the matter to be further considered. Adjudications of individual acts occurring at a subsidiary will require showing of the involvement of the relevant individual in the activities of the broadcast subsidiary, and the existence of an attributable interest in the broadcast subsidiary. FCC-related misconduct will be treated in the same fashion as that involving the parent-subsidiary relationship.

D. Misconduct and Multiple Owners

1. Questions Raised

83. Related to the treatment of corporate misconduct is the manner in which misconduct at one station owned by a multiple licensee is viewed as influencing the Commission's disposition of transactions involving other stations owned by that licensee. The NOI set forth two questions on this matter:

> "(e)" What impact should a finding of misconduct at one station have on the Commission's treatment of other commonly controlled stations?"
>
> "(f)" What effect should misconduct at one station have upon a multiple-owner licensee's ability to acquire or assign other licenses?"

84. The Commission observed in the NOI that it had historically "tried to determine whether, as a result of misconduct at the licensee's first station, the Commission had any reason to believe that there was a likelihood of the same or similar misconduct occurring in the future at the licensee's other stations."[97] We

[97] We stated that in instances in which the conduct in question is being investigated in a hearing and the renewals of the owner's other licenses are pending, we might be unable to determine the relevance of the conduct to the

tentatively concluded that the determination in question depended on "the seriousness of the conduct at the first station as well as the licensee's past performance at each of its other stations." We requested comment on the view that an adverse finding regarding one station should not be automatically extended to others, suggesting that the misconduct at the first station might "be considered as evidence rather than a determinative finding" that such wrongdoing could be expected to recur at other commonly-owned facilities.

85. The Commission noted that the then-existing policy regarding sale of other commonly-owned facilities was to determine at the time of designation whether there was a substantial likelihood that the allegations being considered bore upon the prospective operation of the other stations.[98] If the finding was in the affirmative, the Commission advised the broadcaster that transfer or assignment applications for the other stations would not be entertained. This action could be taken by conditioning the renewal of the other stations. If no such limitation was expressed by the Commission, the licensee was free to assign or transfer in accordance with normal procedures. However, the Commission retained the right to impose limitations or take appropriate action against the other stations at a later time if circumstances warrant. Conversely, limitations imposed might later be removed if found appropriate.

86. While the Commission found those procedures to be an improvement over the former policy of deferring action on the assignment or transfer applications related to uninvolved station[99], we solicited comment on further changes. One such proposal on which comment was requested was that when it appears an allegation warranting designation of one station bears upon the operation of others, those other stations be designated for hearing in order to provide the licensee the opportunity to demonstrate that the alleged misconduct involving the first station is not relevant to the others. We further requested comment as to whether, in order to remove an undesirable licensee from the airwaves, it might be proper to allow the

operation of other stations. We requested comment as to whether, in such cases, we should "designate the renewal applications of these other stations for hearing, defer action on their renewals or grant those renewals (assuming they are grantable in all other respects) without prejudice to the taking of further action based on the finding deduced in the ongoing investigation or Commission hearing."

[98] *See Grayson Enterprises, Inc.*, 79 FCC 2d 936, 940 (1980).

[99] *Policy Statement on Qualifications of Broadcast Licensees*, 28 RR2d 705 (1973).

licensee to sell the station "with some kind of bar to future ownership or management of broadcast facilities," even if a profit is derived. We asked for comment as to whether, (consistent with our proposal on sales), the transfer or assignment application for an acquisition should be designated for hearing so the licensee would have the opportunity to show that the conduct in the first hearing was not relevant, or, alternatively, whether we should approve the assignment conditioned on the findings in the hearing on the first station.

2. Comments

87. Commenters such as NBC, Tribune, AFC and NRBA concur in our tentative view that misconduct at one station should not be presumed to be relevant to others. NBC remarks that the fact that misconduct has not occurred at the other stations is evidence that the licensee can operate them in the public interest, and states that the renewals of such stations' licenses should be granted rather than deferred. NRBA and Citizens comment, however, that if the licensee has engaged in fundamental misbehavior, such as clear misrepresentation to the Commission, that misconduct should be considered to apply to all of the licensee's stations. Similarly, UCC contends that if the misconduct reflects the licensee's attitude toward regulation, said misconduct might have an impact on all of its licenses.

88. NCCB, NBMC and CCA take a more restrictive view, arguing that generally all commonly controlled stations should be treated consistently, misconduct at one station consituting a strong presumption that the licensee is not qualified to operate the others. NBMC states in this regard that the greater the revenue expectation, the greater is the responsibility. However, CBS contends that even in a situation in which denial of renewal might be proper for deterrence, multiple denials would go beyond anything necessary to achieve the Commission's legitimate goals.

89. As to transfers and assignments, such parties as ABC, "Station Licensees" and NCCB recommend that we retain the *Grayson* policy, while CBS supports the proposal that in cases in which the Commission determines assignments will not be allowed, the party involved have the right to ask for an immediate hearing so as to show its other stations are not involved. Both CBS and NBC also encourage the use of unrestricted post-designation non-distress sales in order to increase the licensee's incentive to forego a hearing, rid the community of a possibly

"unfit" licensee, avoid imposition of an unduly harsh financial penalty—the loss of the investment involved—increase investor certainty and encourage capital investment in broadcasting. However, NCCB believes that allowing such transactions would encourage misconduct, "since licensees would be confident that if their misconduct is discovered, they could always sell their remaining licenses," a view in which Citizens joins.

90. BML suggests that the *Grayson* policy be reversed and distress sales of uninvolved stations allowed even pre-designation. A distress sale is sanction enough, BML contends, and will eliminate the need for a lengthly hearing, remove a poorly performing licensee, and advance minority ownership. BML also advocates that in appropriate circumstances our policy barring distress sales after Initial Decisions have been rendered might be waived. In a contrary vein, Citizens proposes a return to the 1973 policy, with increased expedition in the Commission's handling of the applications in question.

91. As to the policy of prohibiting acquisitions by licensees in hearing on basic character issues, CBS supports our alternative proposal of designating the matter for hearing, or conditionally approving the acquisition, while NBC believes a licensee whose misconduct has been found directly bearing on operations in only one community "should not be precluded from acquiring additional licenses if the standards for such acquisitions otherwise are met." However, NCCB opposes conditional acquisitions and argues that allowing a hearing to establish that there has been no misconduct which would apply to the new station would be "a total waste of Commission resources." There would be a strong possibility, NCCB states, that the licensee would be forced to cease operations within a short period of time, and "if the misconduct later results in an adverse finding, the Commission has placed itself in a quandary concerning the new license grant to an untrustworthy licensee."

3. Conclusions on Multiple Owner Misconduct

92. After considering the record developed herein, the Commission reaffirms its tentative view that there should be no presumption that misconduct at one station is necessarily predictive of the operation of the licensee's other stations. We do, however, agree with NRBA and Citizens that some behavior may be so fundamental to a licensee's operation that it is relevant to its qualifications to hold any station license. This is, however, a

question of fact which must be resolved by the Commission on a case-by-case basis.[100] We do not believe that NCCB, NBMC and CCA have made a persuasive showing that there is a basis for automatically presuming that misconduct at one station means the licensee is unqualified to operate others. In this regard, there is merit to NBC's view that the apparently proper operation of the other stations is itself evidence of the licensee's capacity to operate broadcast stations in the public interest.[101]

93. In early 1983, the Commission overruled that element of the *Grayson* policy which involved limiting station transferability by conditioning the license renewals of those of the multiple owner's stations not being designated for hearing. Under the new policy, the transferability of commonly-held stations is settled at the time of designation of the station whose qualifications are primarily at issue. The Commission found that "[i]f the charges are serious enough to possibly affect the transferability of the multiple owner's other stations, then by designating all the stations, we afford licensees faced with qualifications questions a better opportunity to defend themselves at the earliest practicable date." Unless the licenses are designated, they are freely transferable without condition.[102] The action taken is consistent with one of our NOI alternative proposals, and we believe the new policy, which was adopted after substantial experience with the procedures set forth in *Grayson*, should remain in effect. Thus, no restrictions will be placed on the renewals of any stations not designated. We do not find that reapplication of the restrictions of the 1973 policy, as advocated by Citizens, would be a proper method by which to advance our regulatory goals.[103]

94. As with renewals, we find that restrictions on new acquisitions should be consistent with the action taken regarding assignments and transfers. Thus, absent Commission action to

---

[100] *RKO General, Inc. v. FCC, supra* note 8 at 237.

[101] There is a rebuttable presumption of service in the public interest. *BCFM, supra* note 17 at 416.

[102] *James S. Rivers*, 48 Fed. Reg. 8585, published March 1, 1983; *Transferability of Broadcast Licenses*, 53 R.R. 2d 126 (1983).

[103] We also note that there is a pending proceeding concerning changes to our distress sale policies. *See Notice of Proposed Rule Making* in MM Docket No. 85-299, FCC 85-543 (released October 8, 1985). Accordingly, we shall reserve judgment regarding post-designation distress sales. We would observe, however, that concerns regarding an applicant's character are generally more relevant where an applicant is acquiring, as opposed to transferring, a broadcast license. Moreover, the policy of deterrence, which is primarily aimed at ensuring compliance with our rules and policies, is not necessarily implicated by permitting transfers when the alleged misconduct involves non-FCC related activity.

restrict transfers or assignments of the licensee's other stations, we will in the future ordinarily allow such acquisitions to take place without conditions being imposed.[104] If the Commission has not as an initial matter found that the allegations under consideration involve conduct likely to impact the future operations of other stations, there generally appears to be no reason to condition or defer such transactions. We note, however, that allowing the initial acquisition does not affect the Commission's discretion to take action against the newly acquired stations, should the Commission's inquiry ultimately reveal that the application does not possess the requisite basic qualifications to remain a licensee.

95. Under present procedure, however, no decision is made regarding the seriousness with which the Commission views misconduct at a singly-owned station designated for hearing. Given our new procedures regarding acquisitions, we will in the future indicate in the designation orders of such stations if restrictions on acquisitions are to be imposed. In the absence of any action, no restrictions are to be presumed. As to the new applicant with no stations and its first application in hearing on character issues, additional acquisitions will be defferred or made subject to the outcome of the pending proceedings. We believe this procedure is appropriate because, unlike multiple owners with existing licenses, new applicants have no demonstrable evidence of their ability to perform consistent with the Commission's rules and policies.

E. Factors for Analysis

1. Questions

96. The last question formally raised in the NOI was:

> (g) What factors are appropriate for analysis when examining an applicant's past misbehavior?

97. In this regard, the Commission noted that we had traditionally "analyzed the substance of the improper activities to determine their relevance and weight with respect to the ability of the applicant to operate its requested facility in the public interest." We observed that while we had, in the *Uniform Policy*, recognized that there is "no simple formula for predicting future conduct in every case," we had also in that document set forth several factors to be considered when determining the weight to

[104] *See Metroplex Communications of Florida Inc.*, FCC 84-244 (June 1, 1984).

be given acts of misconduct. These factors include "whether the misconduct was isolated or recurring, inadvertent or deliberate, and recent or remote." We asked for comment as to whether these and/or other factors were proper to apply in our efforts to predict future broadcast behavior. Additional factors which we proposed might be appropriate are the degree of harm inflicted on the public, the nature of the knowledge and involvement of management officials and significant stockholders, and "whether prompt corrective action has been taken." Further, we asked whether there was some point (perhaps ten years preceding the filing of an application) "beyond which misconduct should not be considered because of its age."

98. We emphasized that whatever factors were found relevant to our evaluation, "the Commission's constant goal should be to ensure licensee reliability." Thus, we asked for comment as to whether we should grant an application, regardless of serious misconduct, if the applicant can demonstrate "that it is capable of being trusted to operate its station in the public interest and that the likelihood of future misconduct is non-existent."

2. Comments

99. In response to our inquiry, a number of commenters, including Tribune, CBS, NCCB, and Citizens, suggest retention of the three factors of the *Uniform Policy*. Citizens states that a presumptive ten year statute of limitations might be an appropriate limitation on consideration of past misconduct, while CBS argues that "[w]ith the possible exception of conduct which may be said to reflect a pattern of flagrant disregard of the Commission's regulations and policies," there is no reason that activity occurring prior to the current license term should be considered.

100. Both Tribune and CBS state that any misconduct being considered must be weighed against the licensee's broadcast record. Tribune suggests that relevant factors in addition to those in the *Uniform Policy* include whether management was involved and whether corrective steps were taken. CBS comments that the degree of harm to the public is a factor which might be taken into account. NCCB agrees that the seriousness of the infraction is important, but would also consider whether the wrongdoer is contrite or unrepentant. Similarly, Citizens suggest that rehabilitation is relevant. Citizens also urges that the Commission take care "not to limit its ability to conduct as full of an inquiry as the specific facts demand." However, NAB argues that under the

Uniform Policy, the Commission has "sought to draw ultimate inferences concerning an applicant's future good faith and probity from a variety of findings concerning the *mens rea* underlying particular aspects of the applicant's past conduct." NAB contends that "even if predictions of future trustworthiness could be quantified in some fashion, the Commission has never sought to define the degree of risk to the public that it will find acceptable." Thus, NAB concludes, "[i]t is apparent in retrospect that this approach to character leaves the widest room for the kind of subjective, inconsistent decision-making that the Notice candidly describes." The danger, NAB states, is that "a facade of objectivity will be constructed around an assessment that is ultimately intuitive."

101. In response to the Commission's question as to whether an applicant who had engaged in serious misconduct might nonetheless have its application granted if it could demonstrate the ability to operate in the public interest with no likelihood of future misconduct, Citizens states that the question "presents something of a contradiction in terms," observing that no examples were given. Citizens argues that "serious wrongdoing by definition disqualifies an applicant from becoming or remaining a public trustee," and states that "mere promises of exemplary future behavior cannot form the basis for grant of a license."[105] Thus, Citizens finds that while it might be "arguably conceivable in the abstract to, for example, grant renewal in spite of serious misconduct, it is impossible to here fashion a benchmark for resolving such a case." Citizens contends that this would have to be done, "if at all," case-by-case.

3. Conclusions Regarding Analysis

102. Upon consideration of the record developed, and in view of our experience in this area, the Commission finds that the three factors of the *Uniform Policy* should continue to be utilized in determining the weight to be accorded acts of misconduct. We continue to believe that the willfulness of the misconduct, the frequency of such behavior, and its currency are relevant to the process of making predictive judgments about future broadcast performance. We further find that the factors set forth in the NOI, which have in fact been used at various times in our past analyses, are also useful to this process. The seriousness of the

[105] Citing *United Church of Christ v. FCC*, 359 F.2d 994, 1008 (D.C. Cir. 1966) ("*United Church I*").

misconduct, the nature of the participation, if any, of managers and owners, and the efforts made to remedy the wrong all appear to benefit the analytic process. Additionally, the applicant's record of compliance with our rules and policies, if any, should ordinarily be taken into account.[106]

103. As we have earlier observed,[107] deterrence is an important element of the character qualifications process, as it helps to ensure future reliability and truthfulness. The role of deterrence in the licensing process has long been recognized.[108] The purpose of the character qualifications aspect of the Commission's licensing process is not, of course, to eliminate licensees from further activity in broadcasting, but, as we have stated, to assure that those granted a license will be truthful in their dealings with the Commission and reliable operators of their stations. Sanctions imposed may deter future misconduct of the applicant in question and of others observing our actions. As many commenters note, a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission. Suffering the loss of one station, with the costs thereby imposed, will likely serve to deter all but the most unrepentant from serious future misconduct. Only in the most egregious case need termination of all rights be considered.

104. While we understand NAB's concerns regarding the pitfalls of this process, we believe that insofar as we have determined that character qualifications findings are to continue as part of broadcast licensing such analyses are necessary, notwithstanding that they are sometimes imprecise. The Commission is, however, of the view that in redefining the type of conduct we consider relevant to making character findings, and in refining the manner in which allegations of misconduct will impact upon the licensing process, we have taken significant steps to make our efforts in this area more equitable and efficient.

105. The Commission finds that NAB's concerns regarding subjectivity are relevant to NCCB's request that we consider whether the wrongdoer is "contrite or unrepentant," and will not add to our list of factors regularly to be applied. However, we concur with Citizens that rehabilitation is significant. We find that factors which we have already determined to consider,

---

[106] We stress that this analysis only comes into play after the Commission has found the conduct in question involves character issues.

[107] *See supra* note 26.

[108] *FCC v. WOKO*, *supra* note 10 at 228. *See also Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981).

including the passage of time since the misconduct, the frequency of misconduct, the involvement of management and the efforts to remedy the situation, are good evidence as to whether rehabilitation has occurred. No separate "rehabilitation" inquiry appears necessary, although findings regarding rehabilitation would not be inappropriate. As to the time period relevant to character inquiries, we find that, as a general matter conduct which has occurred and was or should have been discovered by the Commission, due to information within its control, prior to the current license term[109] should not be considered, and that, even as to consideration of past conduct indicating "a flagrant disregard of the Commission's regulations and policies," a ten year limitation should apply. The "inherent inequity and practical difficulty"[110] involved in requiring applicants to respond to allegations of greater age suggests that such limit be imposed.

106. As a last consideration in this area, the Commission notes that having again reviewed the matter, we find merit to Citizens' analysis regarding whether the applicant involved in serious misconduct might have its application granted if it could show the ability to operate in the public interest with no likelihood of future misconduct. The granting of such application is, as Citizens states, "arguably conceivable in the abstract," but the matter must be confronted on the facts of a particular case.

IV. Comparative Proceedings

1. Questions Presented

107. A significant matter which remains to be determined is the manner in which character issues should be treated in comparative proceedings. The present treatment of comparative hearings involving new applicants is governed by the *1965 Policy Statement on Comparative Broadcast Hearings*[111], which also controls the introduction of evidence, but not the weight given the various criteria, in comparative proceedings involving renewal applicants.[112]

108. In the *1965 Policy Statement*, the Commission said as to the treatment of character:

---

[109] This time limit is consistent with our recent handling of such matters. *See Central Texas Broadcasting Company, Ltd.*, 90 F.C.C.2d 583, 593 (Rev. Bd. 1982), *aff'd* ____ FCC 2d ____ *(1983)*.

[110] *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1406-1407 (1979), *recon. denied*, 46 R.R.2d 1583 (1980).

[111] 1 FCC 2d 393 (1965) (hereinafter "*1965 Policy Statement*").

[112] *Seven (7) League Productions, Inc. (WIII)*, 1 FCC 2d 1957, 1958 (1965).

> Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be entertained.[113]

2. *Comments*

109. Limited comment was received on the treatment of character in the comparative process in response to the NOI. For example, ABC and NRBA suggest that consideration of nonbroadcast misconduct might be appropriate as a comparative factor. ABC states that this might be useful to distinguish which of the applicants can best be relied upon to be honest and to comply with the Communications Act, Commission rules and policies. However, NRBA would not consider such misconduct relevant to a renewal applicant.[114]

3. *Conclusions*

110. After reviewing the record in this proceeding and in light of our own experiences adjudicating character issues in the comparative context, we are of the view that character considerations should be excluded from comparative analysis. We believe that such an approach is consistent with the policies articulated in the *1965 Policy Statement* as well as the new guidelines established herein. It is significant that one of the primary purposes of the *1965 Policy Statement* was to eliminate from the hearing process time consuming elements not substantially related to the public interest.[115] As applied to character, the Commission recognized that while character considerations "may be appropriate" as a comparative factor, there was a need to avoid unduly prolonging the hearing process.[116] Balancing these competing considerations, the Commission concluded that in the absence of a designated issue, character evidence would not be taken.[117]

---

[113] *1965 Policy Statement*, *supra* note 111 at 399.

[114] NAB suggests that we consider the issue in a subsequent inquiry. However, Blair/Post-Newsweek oppose this view, stating that there is no particular reason to deal with character differently in a comparative context than in any other applications situation.

[115] *See 1965 Policy Statement*, *supra* note 111 at 394.

[116] The Commission noted, "[o]ur intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponents minor blemishes, no matter how remote in the past or how insignificant." *Id.* at 399.

[117] *Id.*

Moreover, the Commission noted that it did not intend to stultify the continuing process of reviewing its judgment as to the scope of its character inquiry in the comparative context.[118]

111. Our experience with the standards established by the *1965 Policy Statement* reveals that we have been unsuccessful in screening out those comparative character issues which have little relevance to our regulatory concerns. Narrowing the range of relevant behavior will not by itself, screen out all issues lacking in probative value. Even where the type of misconduct is basically probative we find ourselves in the position of adjudicating an applicant's minor transgressions which have very little bearing on its ability to act as a responsible broadcaster.[119] Moreover, in comparative proceedings the character issues specified seldom prove to have decisional significance.[120]

112. Elimination of character as a comparative issue is also consistent with the policy objectives underlying in the instant proceeding. As observed previously, the scope of the Commission's character inquiry will now focus on those aspects of an applicant's character that relate to its proclivity for truthfulness in dealing with the Commission and its propensity for complying with our rules and policies.[121] Unlike our prior approach — which often attempted to determine which applicant possessed superior moral fiber — the policies underlying our new character inquiry do not readily lend themselves to a comparative analysis. In this regard, the propensity for an applicant to be truthful and reliable related to its basic qualifications to be a licensee. Once this fact has been established, further comparative inquiry is of marginal benefit.[122] Because our previous policies attempted to determine which applicant was morally superior, there was an incentive to

---

[118] *Id.*

[119] As the Review Board has observed, "[i]t is recognized that in comparative licensing proceedings where the applicants qualifications are freqently fairly close, it is all but irresistible to stick the competition with a misrepresentation or lack of candor finding as a surefire way to secure the license. It is not surprising, therefore, that our comparative case law is littered with allegations of prevarication to the point where an unfamiliar reader would declare that our processing files are a collective rap sheet of the nation's pathological liars." *Fox River Broadcasting Company, Inc.* 88 FCC 2d 1132, 1139 n.15 (Rev. Bd. 1982) aff'd 93 FCC 2d 127 (1983).

[120] A review of all comparative proceedings reported in *Pike and Fisher Radio Regulations 2nd Series* reveals that designated comparative character issues, as opposed to basic qualifications issues, have been dispositive in only approximately eight cases during the past twenty two years.

[121] *See infra* text as paras. 21-23.

[122] In this regard, our approach to character is similar to our consideration of citizenship and financial qualifications. *See* 47 U.S.C. § 308(b); *1965 Policy Statement, supra* note 111 at 399 n.13.

compare all aspects of an applicant's character with that of its competitor. The new focus of our character inquiry, however, has eliminated the need for such a comparative approach.

113. In light of these considerations, we can no longer justify the costs associated with comparative character evaluation. Such an evaluation increases the cost, complexity, length and subjectivity of these proceedings without a sufficient benefit. Nothing in the Communications Act requires that there be comparative character issues. Accordingly, if consideration of character does not lead to disqualification, it will no longer be a relevant criterion in comparative proceedings involving new applicants.

114. We also believe that comparative character issues should be excluded from consideration in comparative renewal proceedings. As observed previously, there appears to be no basis for treating existing licensees differently from new nonlicensee applicants.[123] Moreover, the policy considerations for eliminating comparative character issues in the new applications process are equally applicable to the comparative renewal process. In addition, we believe that the existence of a record of compliance with our rules and policies renders comparative character analysis inappropriate in the renewal context. The fundamental purpose of our character inquiry is to make predictive judgments relating to an applicant's propensity to deal honestly with the Commission and to comply with our rules and policies. In the comparative renewal context, however, a licensee's record of compliance provides direct evidence of an applicant's future behavior. In this regard, we believe that direct evidence of an applicant's behavior outweighs predictive judgments based on extrinsic evidence of an applicant's character.[124] Of course where evidence of bad character during the preceding license period is of such a nature so as to raise a qualification issue, then such evidence should be considered. Accordingly, if consideration of character does not lead to disqualification, it will no longer be a relevant criterion in comparative renewal proceedings.[125]

---

[123] *See supra* at para. 49.

[124] The Commission has implicitly recognized this fact in numerous cases where an applicant's past broadcast record has outweighed a comparative character demerit. *See Westinghouse I, supra* note 22.

[125] Our action today in no way prejudges consideration of compliance with the Communications Act and/or the Commission's rules and policies as it may relate to an incumbent's past broadcast record in the context of acquiring a legitimate renewal expectancy. *See Notice of Inquiry* in Gen. Docket No. 81-742, 88 FCC 2d 120 (1981) For example, violations of the Communications or a specific commission rule or policy may militate against the finding of a meritorious record.

V. BC Docket No. 78-108

1. Questions Presented

115. The final matter to be considered in this document is the disposition of the NPRM in BC Docket No. 78-108. In the character NOI, the Commission observed that a number of remedies are available to us when misconduct does not warrant denial of the application in question. We stated that "[t]he ability to impose these lesser sanctions accords the Commission great flexibility in dealing with various infractions." In this regard, we took note of the proposed rules amendment in BC Docket No. 78-108, which would, we stated, "allow the Commission to take direct action against applicants who have engaged in immaterial misrepresentations not warranting denial of their application."

116. In the BC Docket No. 78-108 NPRM, the Commission noted that while, pursuant to the Communications Act[126] and to 18 U.S.C. § 1001, licensees and permittees have an obligation to respond to Commission correspondence in a prompt and truthful manner, the current rules regarding such obligations are primarily limited to matters related to pending applications or Official Notices of Violation. The Commission found that in some instances prompt and accurate responses to Commission correspondence and inquiries were not being received and proposed adoption of a rule in this respect which would in turn subject licensees and permittees to appropriate administrative sanctions (including possible forfeitures). The proposed rules changes would require responses "within the times specified" by the Commission, as well as prohibiting misrepresentations in all written submissions from permittees and licensees.

2. Comments

117. Comments on the proposal were received from ABC and NRBA. ABC opposes both aspects of the proposal, arguing that the changes are "unnecessary and unwarranted." ABC contends that "there is no dearth of agency requirements for prompt responses to inquiries pertinent to the exercise of the F.C.C.'s regulatory responsibilities, and there are ample means at the agency's disposal to require both timely and truthful responses." Although NRBA opposes adding the rule on timeliness of responses, it supports the proposal regarding misrepresentation.

[126] Citing Sections 308(b) and 312.

NRBA notes that as to the regulation on misrepresentation, "[t]he proposal here in question would merely serve to include specific reference" to the obligation to respond truthfully to the Commission in the rules, the effect being "to accord the Commission additional flexibility in its treatment of untruthful responses." NRBA concludes that this change "would not create any new burdens for broadcasters," but, rather, would "benefit broadcasters by making available to the Commission a wider range of sanctions with which to penalize misrepresentations."

3. Conclusions

118. The Commission finds upon consideration of the record that the proposal of a new regulatory requirement mandating timely responses to all Commission inquiries, regardless of their nature, would impose a requirement not shown to be necessary, and extremely complex and costly in implementation. Such a rule might well require Commission mailing of all requests by certified mail, necessitating record-keeping as to which the public interest benefit has not been demonstrated. Our experience in the years which have elapsed since issuance of the NPRM does not reveal the need for this rule. As to the rule on misrepresentation, we are persuaded by the comments of NRBA, and by our reflections upon the treatment of character issues, that the adoption of a new rule Section 73.1015 consistent with our findings herein is in order. The text of the new rule will be found in Appendix "B".[127]

VI. Regulatory Flexibility Analysis

119. Our action in BC Docket No. 78-108 constitutes a final rule under section 553 and generally requires a final regulatory flexibility analysis. In the instant case, however, the *Notice of Proposed Rule Making* was issued prior to January 1, 1981. Pursuant to section 4 of the Regulatory Flexibility Act, P.L. No. 90-623, 82 Stat. 1312 (1980), the obligation to prepare a final regulatory flexibility analysis applies only to rule making proceedings in which a notice of proposed rule making was issued on or after January 1, 1981. Accordingly, a regulatory flexibility

[127] In addition, we have made appropriate revisions to Section 73.3513. We are also amending Section 73.4280 to reflect our deletion of the *Uniform Policy* and the substitution of the policies adopted herein.

analysis is not required in this proceeding.

120. In any event, we do not believe that adoption of this *Report, Order and Policy Statement* will have an adverse impact on small businesses. In this regard, all broadcast applicants will be treated equally with respect to character qualifications and no unique burdens will be placed on small businesses. Moreover, our action in these proceedings will most likely benefit small businesses by expediting the hearing process and thereby reducing the expenditure of time and resources by applicants. Finally, our action in BC Docket No. 78-108, which establishes a new rule prohibiting misrepresentations to Commission inquiries merely codifies our longstanding policy of requiring candor in all dealings with the Commission. We do not perceive such a requirement as imposing a burden on any type of business entities.

VII. Miscellaneous

121. All designation orders adopted after the effective date of this *Report, Order and Policy Statement* should reflect the policies adopted herein. As to comparative proceedings in which the record is still open, the Administrative Law Judge should render his or her decision pursuant to the policies adopted herein. All proceedings which are currently before the Commission, its staff, or any other Commission body should, where appropriate, be resolved consistent with the policies set forth. Cases already decided by the Commission or the Review Board will not be reconsidered, but appeals of Review Board decisions will be acted upon consistent with the policies adopted herein.[128] This action comports with traditional judicial practice while respecting the need for administrative finality, and is consistent with prior Commission practice.[129]

---

[128] On October 23, 1981, United Broadcasting Co., Inc. ("United") filed a motion to strike the "Joint Comments" of District Broadcasting Company, *et al.* ("District"). United contends that the "Joint Comments" are in essence arguments on the merits of certain pending comparative renewal proceedings. In its opposition to the motion to strike, submitted on November 5, 1981, District argues that the purpose of its comments was not to litigate the merits of a particular proceeding, but only to illustrate its discussion of certain matters under consideration in the instant rulemaking. United's reply to District's opposition to the motion to strike, filed on November 9, 1981, asserts that District's statement that its intention was not to litigate the issues involved in other proceedings "defies reason and common sense." The Commission has entertained District's "Joint Comments" to the degree that they properly relate to this rule making proceeding, and said "Joint Comments" are otherwise dismissed.

[129] *See Policy Statement on Comparative Broadcast Hearings, supra,* at 399-400.

122. Accordingly, IT IS ORDERED that, because of the applicability of this Report Order and Policy Statement to pending proceedings and in accordance with Section 553(d)(2)(3) of the Administrative Procedure Act, the policies announced herein ARE ADOPTED, and Section 73.4280 of the Commission's Rules IS AMENDED as set forth in Appendix "B", effective upon publication in the Federal Register.

123. IT IS FURTHER ORDERED that Section 73.3513 of the Commission's Rules IS AMENDED, as set forth in Appendix "B", effective February 20, 1986.

124. IT IS FURTHER ORDERED that new Section 73.1015 BE ADDED to the Commission's rules as set forth in Appendix "B", effective February 20, 1986.

125. IT IS FURTHER ORDERED that all applicable FCC Forms WILL BE AMENDED by subsequent Commission action, in accordance with the provisions in the *Report and Order and Policy Statement.*

126. IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE this Report and Order and Policy Statement to be printed in the FCC 2d Reports.

127. Action herein is taken pursuant to Sections 4(i), 303(r), 308(b), 312, 319(a) and 403 of the Communications Act of 1934, as amended.

128. For further information regarding this proceeding, contact David L. Donovan or Andrew J. Rhodes, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX "B"

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read:

Sections 4(i), 303(r), 308(b), 312, 319(a) and 403 of the Communications Act as amended

2. 47 CFR, Part 73, is amended by adding a new section (§ 73.1015) to read as follows:

§ 73.1015 Truthful written statements and responses to Commission inquiries and correspondence

The Commission or its representatives may, in writing, require from any permittee or licensee written statements of fact relevant to a determina-

tion whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material ommission bearing on any matter within the jurisdiction of the Commission.

NOTE: Section 73.1015 is limited in application to written matter. It implies no change in the Commissions existing policies respecting the obligation of applicants, permittees and licensees in all instances to respond truthfully to requests for information deemed necessary to the proper execution of the Commission's functions.

3. 42 C.F.R. Part 73, Sub. § 73.3513 is amended by revising paragraph (d) to read as follows:

§ 73.3513 Signing of Applications

* * * * *

[d] Applications, amendments, and related statements of fact need not be submitted under oath. Willful false statements made therein however, will be considered a violation of § 73.1015, are also punishable by fine and imprisonment, U.S. Code, Title 18, Section 1001, and by appropriate administrative sanctions including revocation of station license pursuant to Section 312(a)(i) of the Communications Act.

* * * * *

4. 47 C.F.R., Part 73 § 73.4280 is revised to read as follows:

§ 73.4280 Character evaluation of broadcast applicants.

See Report and Order and Policy Statement, Gen. Docket 81-500, BC Docket 78-108, FCC 85 648, adopted Dec. 10, 1985, 51 FR (3049 1986)