

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

In re Applications of

OMAHA TV 15, BC Docket No. 80-691  
INC. File No. BPCT-790629KE  
Omaha, Nebraska

CHANNEL 15/OMAHA BC DOCKET NO. 80-693  
Omaha, Nebraska File No. BPCT-790409KE

MID-AMERICA BC DOCKET NO. 80-694  
BROADCASTING, File No. BPCT-791026KN  
INC.  
Omaha, Nebraska

KOPLAR BC DOCKET NO. 80-695  
COMMUNICATIONS, File No. BPCT-790703KF  
INC.  
Omaha, Nebraska

FAMILY BC DOCKET NO. 80-696  
TELEVISION, File No. BPCT-790627KE  
INC.  
Omaha, Nebraska

**MEMORANDUM OPINION AND ORDER**

Adopted: November 17, 1988; Released: December 19, 1988

By the Commission: Commissioner Quello concurring and issuing a statement.

1. In an initial decision, the presiding officer granted the application of Mid-America Broadcasting, Inc. for a construction permit for a new UHF television station in Omaha, Nebraska. 102 FCC 2d 892 (Admin. L.J.). The Review Board affirmed that disposition. 102 FCC 2d 875 (Rev. Bd. 1985).

2. The Commission now has before it an Application for Review filed on January 6, 1986 by Channel 15/Omaha; an Application for Review filed on January 6, 1986 by Koplak Communications, Inc.; and an Application for Review filed on January 6, 1986 by Family Television, Inc. No Application for Review having been filed by Omaha TV 15, Inc., the Board's denial of that application is final. The Commission also has before it an Opposition to Applications for Review filed on February 13, 1986 by Mid-America; a Partial Opposition to Applications for Review filed on February 13, 1986 by Family; a Motion to Reopen the Record filed on November 13, 1986 by Family; an Opposition to Motion to Reopen the Record filed on December 11, 1986 by Mid-America; and a Reply to Opposition to the Motion to Reopen the Record filed on January 7, 1987 by Family.

**I. REPRESENTATION REGARDING TRANSFER OF STOCK**

3. Mid-America represented in an amendment filed on May 27, 1980 that Larry D. Hudson held 88 percent of its stock and that the only other stockholders were Larry P. Thompson and Dean M. Coe, each with a six percent holding. Mr. Hudson later testified that he had increased his holding to 88 percent in April or May of 1980 by acquiring 1160 shares from his brother, Cale W. Hudson, and 40 shares from one Teri L. Tharp. Tr. at 888, 897. According to Family's motion to reopen, new evidence demonstrates that Mid-America and Larry Hudson falsely portrayed the applicant's ownership structure in representing that Larry Hudson had acquired Ms. Tharp's shares. Family refers to an attached affidavit dated November 6, 1986, wherein Teri Tharp avers that she still holds the 40 shares of Mid-America stock that were originally issued to her, never having surrendered or transferred them.

4. Family asserts, moreover, that Mid-America and Larry Hudson had a motive for falsely representing that Hudson had acquired Teri Tharp's shares. Family points out that any increase in Larry Hudson's ownership would expand Mid-America's integration credit because he proposed to be involved in station management. Further, Family asserts that, because Mid-America was competing against an applicant that had significant advantages in local ownership, minority enhancement, and diversification, Mid-America could not have hoped to prevail except by presenting an extremely strong integration showing. Family contends that the evident misrepresentation of Larry Hudson's ownership percentage has a material bearing on Mid-America's character qualifications, and that this alleged malfeasance is part of a pattern of concealment and deception, referring to certain reporting failures that were discussed in the decision below. (The Review Board concluded that Mid-America's reporting failures were not, by themselves, of such significance as to warrant further evidentiary hearings. 102 FCC 2d at 885-87 ¶¶ 16-18.)

5. In *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964), the Court of Appeals held that orderliness, expedition and finality in the adjudicative process is relevant to the public interest; that, in considering post-hearing motions calling for further proceedings, the Commission must weigh the interest in preserving finality against the interest to be served by further litigation; and that it is therefore proper for the Commission to apply a more exacting standard in weighing the substantive sufficiency of belated motions for such relief than in ruling on timely ones. See also *WEBR v. FCC*, 420 F.2d 158, 166 (D.C. Cir. 1969); *Kidd v. FCC*, 302 F.2d 873, 874 (D.C. Cir. 1962); *Beep Communications Systems, Inc.*, 88 FCC 2d 1303, 1309 ¶ 14 (1982). We conclude that Family is not entitled to the relief it seeks.

6. Applicants have a duty to raise any pertinent allegations concerning their opponents' proposals as soon as possible, preferably before the hearings begin. *High Sierra Broadcasting, Inc.*, 56 RR 2d 1394, 1396 ¶ 7 (1984). Moreover, where the record in the proceeding has already been closed, as in this case, petitioners must show that their contentions are based on newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier and that the new evidence, if true, would affect the ultimate disposition of the proceeding. *American Int'l Development, Inc.*, 86 FCC 2d 808, 811 ¶ 5

(1981). See also *Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72, 73-74 ¶ 4 (1976). Viewed in light of these standards, Family's motion to reopen the record must be denied.

#### A. Due Diligence

7. Not only could the matters now raised by Family have been considered during the hearing in this proceeding, they indeed were. In transcript excerpts attached to Family's Motion, counsel for one of the other applicants indicated in his examination of Mr. Hudson that he wanted to make sure that the facts about the ownership of Mr. Hudson's applicant were set forth in the record, Tr. at 886, and that he wanted to determine what transactions had occurred with respect to the stock. Tr. at 893. Mr. Hudson testified at length about his acquisition of stock from Cale Hudson and Ms. Tharp, and specifically described the basis for the transfer of stock from Ms. Tharp as being part of an overall disassociation of business interests held by Cale and Larry Hudson. Tr. at 887-894, 896-901. As part of this same examination, Mr. Hudson was closely questioned about the amount and percentage of his total interest in the applicant.

8. Under these circumstances, Family had clear notice and ample opportunity to explore all pertinent aspects of Mr. Hudson's ownership interests in Mid-America. Family has given no persuasive explanation of why it did not investigate or attempt to investigate these matters at that time. The record need not be reopened for evidence easily discoverable initially and only deemed crucial "when seen from the highland of hindsight." *Guinian v. FCC*, 297 F.2d 782, 787 (D.C. Cir. 1961). See also *WEBR v. FCC*, 420 F.2d at 165-66.

#### B. Decisional Significance

9. Even if the untimeliness of Family's contentions were to be ignored, Family has made no showing sufficient to affect the ultimate disposition of this proceeding. The interest claimed by Ms. Tharp would amount to only 40 shares of the total ownership in Mid-America. Both the ALJ and the Review Board concluded that Mid-America was entitled to a substantial integration preference based on the quantitative superiority of its proposal to integrate its controlling owner, Mr. Hudson, into station management on a full-time basis. R.B., 102 FCC 2d at 935 ¶ 98; I.D., 102 FCC 2d at 880-82 ¶¶ 9-11. In this connection, Family has not demonstrated that a reduction in the percentage of Mid-America's integration proposal based on the interest claimed by Ms. Tharp would alter the comparative standing of the applicants. Based on circumstances not relevant to Family's contentions, Mid-America's credit for Mr. Hudson's integration was determined to be 83 percent for comparative purposes. 102 FCC 2d at 913 n.24. A change of 40 shares in the ownership of Mid-America would still leave it with at least 81 percent credit for integration. No other applicant is entitled to credit for even 50 percent full-time integration. 102 FCC 2d at 881 ¶ 9. Thus, even if it were ultimately determined that Ms. Tharp does have a 40 share interest in the applicant, that determination would not affect the substantial integration preference awarded below or otherwise alter the ultimate comparative standing of the applicants under the circumstances of this case.

10. There is no showing that Larry Hudson's claims of ownership during the hearing in this proceeding were made in bad faith or with an intent to deceive. Mid-America is a small, closely held corporation, and the

record indicates that Ms. Tharp's stock was held in conjunction with Cale Hudson's original ownership interest. Larry Hudson testified that he acquired Ms. Tharp's shares pursuant to an unwritten agreement, the object of which was to disassociate his corporate interests from his brother's, and by the terms of which he was to transfer his interest in another corporation to his brother and was to receive both the latter's 29 percent interest and Ms. Tharp's 1.4 percent interest in Mid-America. Tr. at 896-900. Evincing confusion as to what, if any, consideration Ms. Tharp was to receive for her shares, Larry Hudson testified that he had not dealt directly with her in this regard but had been given to understand that she was willing to surrender her interest in Mid-America whenever his brother ended his affiliation with it. Tr. at 900-901. Mid-America submitted a corroborating affidavit with its Opposition to the instant motion, wherein Larry Hudson's brother avers, among other things, that at a meeting held in May 1980 "a majority" of Mid-America's directors and stockholders "determined that the stock ownership of the company was revised to transfer Cale Hudson's and Terri Tharp's ownership to Larry Hudson."

11. Although Tharp alleges that she did not "participate in" any agreement between the Hudson brothers for a division of assets, she does not aver that she ever said anything to Larry Hudson that would have given him cause to doubt that she was willing to surrender her stock pursuant to the arrangement that he and his brother contemplated, nor does she aver that she gave him any overt indication prior to the time when he testified that she considered the stock to be still hers. The present record, therefore, provides no basis for a finding other than that Larry Hudson relied on an undertaking by his brother to deliver over Tharp's shares along with his own, without consulting Tharp himself concerning her intentions.

12. It is reasonable to infer from the existing record that Larry Hudson believed that he had taken title to those shares even if, in fact, he had not acquired them. Family has produced no averment from either of the two accessible witnesses with personal knowledge of relevant circumstances (Teri Tharp and Cale Hudson) that affords any clear indication that Larry Hudson knew the truth to be other than as he depicted it. Given the small size of the stock interest in question and the serious consequences that could arise for Larry Hudson from a misrepresentation of this nature, there is an inherent implausibility about Family's contentions. Considering this circumstance, and considering that there is no factual basis for a claim of bad faith or deceit, we conclude that Family's claim of a pattern of concealment and deception is without merit and that no reason exists to pursue this matter further. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1211 ¶ 61 (1986).

13. We therefore hold that Family has not made any showing that would warrant our reopening the record at this late stage of the proceeding and that the public interest will be best served by our resolution of this case on the basis of the present record.

## II. DAILY MANAGEMENT PARTICIPATION OF STATION OWNERS

14. Channel 15 raises a significant issue regarding the way the Commission evaluates integration credit for a manager who will not be physically present at the proposed station management on a daily basis. John Tyler owns 51 percent of Channel 15, a Texas partnership. He proposes to work at the television station as its chief executive officer three days per week for a total of 30 hours. The ALJ found that Tyler "plans to hire people for all major line positions." I.D., 102 FCC 2d at 932 ¶ 93. On days when Tyler is not working at the station in Omaha, he will be in Dallas, Texas, where he resides.

15. The ALJ awarded 51 percent "substantial" integration credit to Channel 15 for Tyler's proposal. *Id.* The ALJ ruled that Tyler's residence in Dallas rather than Omaha did not create a bar to awarding Channel 15 part-time integration credit for Tyler's 30 hours per week. Citing as authority *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd. 1982), the ALJ wrote: "Local residence is not a prerequisite for an award of part-time integration credit. In addition, while full-time integration credit requires devotion to the station of substantial amounts of time on a daily basis, that is not necessary in the case of part-time proposals." 102 FCC 2d at 932 ¶ 93.

16. The Review Board reversed the ALJ's award of integration credit to Channel 15. Quoting footnote 2 of *Bay Television, Inc.*, FCC 85-58 at 1 n.2 (released Mar. 25, 1985), the Board refused to award Channel 15 any integration credit at all, because it said that "the Commission held that integration credit would not be given where an owner 'did not propose to work at the station on a daily basis.'" R.B., 102 FCC 2d at 881 ¶ 10 (emphasis added). The Board emphasized that Tyler "will live in Dallas, Texas and spend only three days per week at the Omaha station rather than participate daily as required to receive integration credit." *Id.*

17. Channel 15 argues that the Review Board's decision in effect has created a "daily service" standard that would "virtually require local residence to enable compliance." Channel 15's Application for Review at 7. In Channel 15's view, such a standard would harm the public interest:

The Board's new daily service standard will forestall participation by individuals who can best function on a part or substantial-time basis and who would focus their participation in discrete time blocks over less than the five working days of the week. At a time when employment patterns have become more flexible, the inflexible ruling is an anachronism which will only embarrass the Commission in this and future contexts. Therefore, to the extent it is not based on *Bay Television*, the Board's decision raises a novel issue of policy regarding the definition of daily service which warrants Commission review.

*Id.* at 7. Consequently, argues Channel 15, "the Board's strained holding which denies Channel 15/Omaha any integration credit for the time John Tyler will devote to the management of its proposed station, based on a wisp of a footnote, should be reversed." *Id.* at 8.

18. This issue requires us to reexamine a facet of our longstanding policy of rewarding the integration of ownership into management. Our starting point is the 1965 *Policy Statement*, which contains several sentences that

emphasize the Commission's expressed preference in 1965 for the owners of a broadcast station to be involved in the station's daily management:

It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station . . . . To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis.

1 FCC 2d at 395. It was this last sentence from the 1965 *Policy Statement* on which the Commission relied in footnote 2 of its *Bay Television* decision. In particular, the Commission said that because the applicant's "owners did not propose to work at the station on a daily basis[,] . . . . no integration credit is warranted for these principals' proposal." *Bay Television*, FCC 85-58 at 1 n.2. Channel 15 argues: "This statement, standing alone, does not establish that principals of an applicant must be present each and every day to earn integration credit for substantial commitments, since the statement must be assessed in the context of the case." Channel 15's Application for Review at 6.

19. To the extent that footnote 2 of *Bay Television* is interpreted as a hard and fast rule of law, it lacks a sufficient legal rationale to explain its derivation. Consequently, there is a genuine ambiguity here, the source of which becomes apparent when one examines the text from the initial decision in *Bay Television* that the Commission subsequently cited in footnote 2 of its order in that case. The initial decision in *Bay Television* concluded that the principals in question "will not move to the [proposed license] area, nor will they work on a daily basis." *Bay Television, Inc.*, 95 FCC 2d 190, 220 ¶ 112 (I.D. 1983) (emphasis added). Thus, the ALJ in *Bay Television* suggested that daily management of station affairs was conceptually distinct from the question of whether the manager proposed to reside full-time in the same community as the station. On the other hand, the Commission's footnote 2 carried quite a different connotation. Immediately after citing the page of the ALJ's initial decision on which the quotation above appears, the Commission said: "Here, Bay's owners did not propose to work *at the station* on a daily basis." FCC 85-58 at 1 n.2 (emphasis added). Thus, the Commission seemed to equate proposing to manage a station on a daily basis with proposing *physical presence* at the station each day of the work week. In short, footnote 2 of the Commission's order in *Bay Television* raises, but does not answer, the following question: Is daily physical presence at the station necessary to be granted integration credit -- or is daily management involvement merely required, which might occur even when the manager is in another city and therefore not physically present at the station?

20. We believe that the second interpretation will better serve the public interest. At a minimum, "management" consists of something far more than just calling oneself a manager and being physically present behind a desk at a television station. At the same time, there is difficulty in

having the FCC attempt to define what constitutes "good" management. The Commission is reluctant to impose on applicants any one view of what constitutes a well managed broadcast venture. As we have previously stated, "Having no particular expertise in finance or business management, we are reluctant to second-guess an applicant's business judgment -- so long as it is, in fact, a good faith business decision . . ." *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 ¶ 19 (1988).

21. Therefore, although integration credit depends upon a principal's presence at the station on a regular, periodic basis, we believe that the requirement of daily physical presence for broadcast managers would be highly intrusive on the freedom of entrepreneurs to make their own business decisions, without necessarily resulting in better managed stations. As a general rule, we must presume that an individual manager knows better than the Commission how to most productively manage a radio or television station. Nor can we ignore that technological advances in communications, transportation, information processing, and office automation between 1965 and 1988 have made it more feasible for a manager to manage a broadcast station on a day-to-day basis without the need for physical presence at the station every day. We should acknowledge that we lack the omniscience to determine that a licensee will better serve the public interest by spreading 30 hours of work over five business days rather than three.<sup>1</sup>

22. Apart from unnecessarily interfering with the business judgments of broadcasters, we are concerned that *Bay Television's* "daily service" rule could produce anomalous results. Tyler would be eligible for integration credit if he proposed to work only 20 hours per week, as long as he spread those 20 hours over five days during the week -- for example, in five blocks of four hours each. But he would *not* be eligible for any integration credit if he proposed to spread those 20 hours over four days in five-hour chunks -- or if he continued to work 20 hours over five days but worked out of his home one day a week. Because we no longer find that the former would provide a manager with greater sensitivity to an area's needs and of programming designed to meet those needs, see *1965 Policy Statement*, 1 FCC 2d at 392, we will no longer automatically give preferential weight to the former.

23. Following the "daily service" rule in this case would also risk an arbitrary result. In Channel 15's actual situation, Tyler proposes to work 30 hours per week rather than just 20 hours. He proposes to spread those 30 hours over three days. Under the "daily service" rule, Tyler would get no integration credit at all -- even though he *would* get integration credit under a proposal to work only 20 hours per week, provided that he worked at least a little each day. The Commission does not have any evidence to establish that four hours spent on each of five work days would produce management decisions at a television station that better serve the public interest than ten hours spent on each of only three days each week. While we continue to believe that full time work warrants greater credit than part-time work, we will not require the part-time work to be spread over a minimum of 5 days each week. Accordingly, we conclude that the Board's decision must be reversed to the extent that it denied Channel 15 any integration credit at all for Tyler's proposed management participation.

24. For these reasons, we reverse the Board and reinstate the ALJ's original determination that Channel 15 is entitled to integration credit for the 30 hours that Tyler proposes to work over a three-day period each week. As set forth below, it is clear to us from the record that our reversal of the Review Board on this issue will not change the final determination that Mid-America is the comparatively superior applicant in this case. Consequently, we need not remand this proceeding nor modify the Board's determination as to the applicant most qualified to be granted this new license to serve Omaha.

### III. COMPUTING "PART-TIME" INTEGRATION

25. On our own motion, we raise an additional issue that is related to Channel 15's argument that it should receive "substantial" integration credit. Specifically, we announce here a new method by which to compare competing integration proposals in licensing proceedings. We believe that this new method will make anomalous integration results less likely to arise and should provide an easier and more precise method for comparing competing applicants.

26. In the past, the Commission has suggested that there are only two types of integration proposals: full-time (at least 40 hours per week) and part-time (at least 20 hours per week). *E.g.*, *1965 Policy Statement*, 1 FCC 2d at 395; *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494-95 ¶ 9 (Rev. Bd. 1979), review denied, FCC 79-397 (released June 21, 1979). Thus, the Commission has given only part-time integration credit to proposals to be integrated 20-39 hours per week. In addition, the Review Board has awarded more comparative credit for proposals to be integrated 30-39 hours per week than for proposals to be integrated only 20 hours per week. See, *e.g.*, *Webster - Baker Broadcasting Co.*, 88 FCC 2d 944, 953 ¶ 20 (Rev. Bd. 1982). This area of Commission policy has become far more complicated than it needs to be.

27. Part of the problem of computing integration credit is that the Commission has turned a continuous variable (how many hours per week someone proposes to work) into a discrete variable (whether one will be working "full-time" or "part-time" or maybe even "part-time" in substantial amount). It would be much simpler to use a sliding scale, just as the Commission does in giving integration credit generally. For part-time integration the Commission could divide the number of hours to be worked by 40 hours per week, and then multiply this fraction by the applicant's percentage of ownership integration into management. The resulting number would provide immediate comparability across applicants with differing degrees of owner management. For example, a 75 percent owner who proposed to work 36 hours per week would have an integration score of .68 (that is,  $(36/40) \times .75$ ). By comparison, a 90 percent owner who proposed to work only 28 hours per week would score .63 (that is,  $(28/40) \times .90$ ). The ownership shares of other managers could be calculated in a similar fashion and totaled for a particular applicant. In the simple example given here, the first applicant would have a better integration proposal, but not by very much. This method would obviate the rather ambiguous and arbitrary line drawing now conducted in comparative proceedings.

28. This straightforward methodology has not been used in the last seven years after the Review Board expressly rejected it in a terse footnote in *Van Buren Community Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 n.1 (Rev. Bd. 1981). The Board wrote:

In the Initial Decision, [the applicant] was credited with 39% integration computed as follows: 40% (integrated stock ownership) x 75% (for 30-hr week proposed) = 30%, plus 18% (integrated stock ownership) x 50% (for 20-hr week proposed) = 9%, for a total of 39% integration. This mathematical method, although beguiling in its ease of application and apparent precision, overemphasizes the importance of part-time integration in relation to full-time integration.

*Id.*

29. The Board's criticism evidently stems from its concern that a station whose owner works 40 hours per week is, in its view, *more than twice as likely* to deliver "quality" programming than a station whose owner works only 20 hours per week. Stated differently, we understand the Board to believe that the relationship between the number of hours per week worked by owner-managers and the quality of service to the public is not a linear function. The Board stated:

Quantitative credit for integration decreases more sharply than proportionally with a corresponding decrease in the number of hours of participation per week . . . . Hence, we specifically disapprove further use of this mathematical method.

*Id.* (citation omitted). The Review Board's conjecture in *Van Buren* may have a reasonable basis. It is plausible that until a manager devotes a certain threshold number of hours on a weekly basis to the management of a station, his investment of time will not be particularly productive. Nonetheless, it does not follow that a computational approach to part-time integration must be rejected. Rather, the test should in such a case be specified differently to take the nonlinearity into account.

30. Specifically, the Commission can address the Board's concern about nonlinearity by adopting an approach to computing part-time integration credit that is analogous to the Hirschman-Herfindahl Index (HHI).<sup>2</sup> To extend the earlier example, the 75 percent owner proposing to work 36 hours per week would score as follows:  $(100 \times (36/40))^2 \times .75 = 6075$ . The 90 percent owner proposing to work 28 hours per week would score significantly less:  $(100 \times (28/40))^2 \times .90 = 4410$ . Under this approach, the relative inferiority of the second applicant's reduced management participation would be given greater relative significance under the HHI approach than under the simple linear approach that the Board criticized in *Van Buren*.

31. Such an approach would be far less ambiguous than the Commission's current practice of evaluating the integration significance of part-time management. As a consequence, we believe it would, on the margin, reduce for both the Commission and applicants the transactions costs associated with comparative licensing proceedings. This new method eliminates the need for crude categories such as "part-time" and "substantial" integration. It also en-

ables the Commission to summarize the number of hours that an applicant proposes to participate in station management each week, once the 20 hour per week threshold requirement is met, in a single statistic that also accounts for the percentage degree of ownership integration into management. Because we expect these advantages to reduce somewhat the imprecision and uncertainty in broadcast licensing proceedings, we believe that this new method for computing integration credit will help the Commission to provide service to the public in the most efficient, expeditious manner possible. This weighting should, moreover, address the precise misgivings that originally caused the Review Board in footnote 1 of *Van Buren* to reject a computational approach to evaluating integration credit. Of course, if experience proves that this weighting is inappropriate in some respect, the Commission need merely revise the formula for computing credit. Therefore, we direct the Review Board and the ALJs to begin using this approach when comparing either full-time or part-time integration proposals.

32. In this case, for example, Channel 15 is 51 percent integrated into management, and Tyler proposes to work 30 hours per week. Therefore, Channel 15's HHI is  $(100 \times (30/40))^2 \times .51 = 2869$ . We can also compute HHIs for the other applicants. Mid-America proposes full-time management participation by its 83 percent owner:  $(100 \times (40/40))^2 \times .83 = 8300$ . Family proposes full-time integration of its 10 percent owner and 20 hours per week of integration for its 21.75 percent owner:  $[(100 \times (40/40))^2 \times .10] + [(100 \times (20/40))^2 \times .2175] = 1000 + 544 = 1544$ . Omaha TV proposes full-time integration of its 15 percent owner:  $(100 \times (40/40))^2 \times .15 = 1500$ . Finally, Koplal does not propose to be integrated into management at all:  $(100 \times (0/40))^2 \times 0 = 0$ . Thus, Mid-America still emerges as the comparatively superior applicant in terms of integration.

#### IV. THE COMPARATIVE SIGNIFICANCE OF PAST SUCCESS IN THE BROADCAST MARKETPLACE

33. Koplal contends that the Commission should consider Koplal's successful operation of existing broadcast stations as a favorable comparative factor. Koplal maintains that its other stations have been exceptionally successful in drawing audiences and that such success is the best measure of how well a commercial station is serving the public interest.

34. Koplal refers to information about the performance of television stations in St. Louis and Sacramento under its proprietorship. According to an exhibit that it proffered at the hearing, Koplal's St. Louis station, KPLR-TV, "had become the number one rated independent news station in the United States, ranking among the top five independent stations in the country overall. According to the July 1981 Arbitron survey, KPLR had a 17% audience share in the St. Louis ADI, and a net weekly circulation of 931,000 -- compared to 926,000 households for the local NBC affiliate." Koplal's Application for Review at 3. In Sacramento, Koplal similarly argues, "its then recently acquired UHF television station KRBK-TV . . . increased its net weekly circulation from 45,000 television households in February of 1981 to 226,000 television households in July of 1981 following acquisition in April of that year." *Id.* at 3-4. Koplal alleges that its success with these stations is due to use of the most modern technology and "dedication to the public service as

evidenced by its news and public affairs programming." *Id.* at 3. Koplal asserts that it would bring to the Omaha television market the "same abilities and resources which have enabled its stations in St. Louis and Sacramento to succeed." *Id.* at 4.

35. The ALJ rejected that exhibit with the comment that "no threshold showing of past broadcast record" had been made and that Koplal could receive no credit for past performance, in any case, because none of its principals would engage in daily management of the proposed station in Omaha. Tr. at 173. The Review Board, 102 FCC 2d at 885 ¶ 15, affirmed the ruling for the reason that the showing is not of "the type . . . necessary to receive a preference for an unusually good past broadcast record" under the 1965 *Policy Statement*. 1 FCC 2d at 398.

36. While conceding that evidence of marketplace results has not previously been considered, Koplal argues that the Commission ought not to reject its exhibit because of that circumstance:

Koplal submits that things have changed over the past twenty years, and that the Commission's perceptions of reality have changed as well. The marketplace is now deemed to be the prime reflector of how well a station is serving the public interest and, according to marketplace information, Koplal's stations have done exceeding[ly] well. The marketplace success of those stations should be relevant under the standard comparative issues as predictive of the performance of the new facility sought by Koplal.

*Id.* at 4-5.

37. Aside from the mandate in 47 U.S.C. § 307(b) to promote "fair, efficient, and equitable distribution of radio service to each of [the several states and communities]," broad discretion is given to the Commission for determining which of a set of mutually exclusive applications it would best serve the "public interest, convenience, and necessity" to grant. The 1965 *Policy Statement*, which essentially restates doctrine that the Commission had gradually developed through *ad hoc* rulings, identifies two primary public interest objectives to be served in choosing between proposals to provide broadcast service to the same community: "maximum diffusion of control of the media of mass communications" and "best practicable service to the public." 1 FCC 2d at 394. "Best practicable service to the public" means service that best "meets the needs of the public in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share." *Id.*

38. One of the factors that the 1965 *Policy Statement* mentions as of possible relevance in deciding which among competing applicants would best meet needs for broadcast service is the past broadcast records of principals. As defined, the term "past broadcast record" refers to experience of an applicant's principal (whether or not that principal would be integrated into management) consisting of significant participation in operation of a broadcast station in which he or she held ownership. *Id.* at 398. (Previous broadcast experience without ownership, in contrast, is deemed relevant only if claimed by an integrated principal and is considered to be of minor importance. *Id.* at 396.) An ordinary past broadcast record is

immaterial, however, according to the 1965 *Policy Statement*; but one that is either "unusually good or unusually poor" is a factor of substantial importance. *Id.* at 398. The Commission said that in order to determine whether a record was unusually good it would look for evidence of "unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs." *Id.* Once having determined that a principal's "past broadcast record" is unusually good or poor, the Commission would then consider the causes of that performance and the extent to which they would be present in the proposed operation. *Id.* An extraordinary record compiled while the principal fully participated in station operation would not be accorded "full" credit, for instance, if that principal would not have similar involvement in operation of the proposed station. *Id.*

39. Bids for credit for unusually good past broadcast records have seldom met with success. The Review Board gave indication soon after the adoption of the 1965 *Policy Statement* that attempts to prevail on that ground would be disfavored, by ruling in purported reliance on the *Policy Statement* that an applicant would have to make a satisfactory "threshold showing" that a past broadcast record is unusually good or poor before adducing evidence on point. *Pleasant Broadcasting Co.*, 19 FCC 2d 964, 965 ¶ 2 (1969). The Commission ratified that procedure in *Gilbert Group, Inc.*, 49 RR 2d 1081, 1082 ¶ 4 (1981). See also *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 689-90 ¶¶ 25-26 (Rev. Bd. 1986).

40. Koplal's bald and self-serving assertion about its "dedication to public service as evidenced by [the] news and public affairs programming" of its existing stations is not probative. News and public affairs programming, while obviously commendable and an important means of serving the needs of the broadcast community, is not out of the ordinary. Koplal's market ratings showing is not sufficient to make the requisite threshold showing, either. The exhibit in question reportedly discloses how Koplal's stations in St. Louis and Sacramento each fared in drawing audiences in just a single month in 1981. Although it seems, at least, that the St. Louis station was unusually successful in attracting audiences in that one month, we are dubious that results from so short a period of time are representative of longer-term performance. It does not appear from Koplal's description of it, moreover, that the exhibit affords any basis for determining to what extent any unusual success in the performance of its existing stations is due to the integration of principals or other factors that would not be replicated in operation of the prospective station that Koplal's current application proposes. See the 1965 *Policy Statement*, 1 FCC 2d at 398. In sum, we are not persuaded that the information contained in the exhibit affords a sufficient basis for awarding Koplal credit for an unusually good past broadcast record.

#### V. ORDERS

41. ACCORDINGLY, IT IS ORDERED That the Motion to Reopen the Record filed November 13, 1986 by Family Television, Inc. IS DENIED.

42. IT IS FURTHER ORDERED That the Applications for Review filed January 6, 1986 by Channel 15/Omaha and Koplal Communications ARE GRANTED pursuant

to 47 C.F.R. § 1.115(g), to the extent that the decision of the Review Board, 102 FCC 2d 875, is modified herein, and ARE DENIED in all other respects.

43. IT IS FURTHER ORDERED That the Application for Review filed January 6, 1986 by Family Television IS DENIED pursuant to 47 C.F.R. § 1.115(g).

#### FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

#### FOOTNOTES

<sup>1</sup> In addition, *Bay Television's* requirement of daily physical presence ignores that other ways exist to monitor the performance of managers besides counting their hours each day.

<sup>2</sup> It was because the Antitrust Division of the Department of Justice faced this identical conceptual issue that it began using the HHI to discern market power in mergers. *Antitrust Division Merger Guidelines*, 47 Fed. Reg. 28,493 (1982). The Division believed that the likelihood of anticompetitive behavior as a result of a merger is a nonlinear function of the market shares of the two merging firms. So the Division decided that, rather than simply sum market shares of firms in an industry, it would first multiply each market share by 100, square that product, and then sum those squared products; then the resulting index would be evaluated on a scale of 0 to 10,000. See Baxter, *Responding to the Reaction: The Draftsman's View*, 71 Calif. L. Rev. 618, 625-28 (1983) (discussing Assistant Attorney General's drafting of Merger Guidelines). Thus, bigger market shares would be weighted more than linearly in the analysis. The higher the HHI, the greater the inferred likelihood that the merger would facilitate collusion, and thus be unlawful to consummate.

#### SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Applications of Omaha TV 15, Inc., Channel 15/Omaha, Mid-America Broadcasting, Inc., Koplars Communications, Inc., and Family Television, Inc. (Omaha, Nebraska).

I concur with the majority's decision to grant the application of Mid-America Broadcasting, Inc. My preference would have been to uphold the conclusions reached by the Review Board. I am compelled to write separately because the Commission, reaching well beyond the facts before us, decided to use the case as a vehicle for making significant changes to the Commission's integration analysis.

Apart from any substantive concerns, fundamental changes in our integration policy should have been accomplished through a notice and comment proceeding. In fact, the courts have admonished the Commission for making changes to its comparative process without the benefit of public comment. Cf. *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1204 n.5 (D.C. Cir. 1971).

The necessity for rational public comment is certainly evident from the majority's decision to embrace a mathematical formula to compute part-time integration. I understand the desire to develop a more precise comparative integration analysis. However, the precision created by the majority's decision is illusory at best.

The majority embrace a calculation modeled after the Herfindahl-Hirschman Index. The purported benefit of the HHI calculation is that by weighting certain factors it avoids the direct proportional approach to calculating part time integration criticized by the Review Board in *Van Buren Community Broadcasters, Inc.*, 87 F.C.C. 2d 1018, 1022 (Rev. Bd. 1981). However, this formula is designed to measure industrial concentration and the probability of coordinated monopolistic behavior. F. M. Sherer, *Industrial Market Structure and Economic Performance*, 58-59 (1980). There is no evidence that the assumptions underlying the HHI have any relevance to the Commission's integration policies. Thus, the Commission simply does not know whether the formula gives appropriate consideration to locally owned and operated facilities. Moreover, even if the calculations give proper weight to our integration concerns, how significant is a simple numerical advantage in this comparison? For example, if applicant A scores 4410 under this analysis and applicant B scores 4409, should the difference of one point be decisionally significant? If not, at what point does a simple numerical advantage become important? Such decisions are every bit as subjective as our current approach.

The problems inherent in the majority's approach should have been subject to the rigors of public comment. I do not object to revisions of our comparative process, the system is far from perfect. However, I would have preferred a more complete discussion of the issues before making such a radical change in policy.