

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

In the Matter of

Policy Regarding Character
Qualifications in Broadcast
Licensing

Amendment of Part 1, the Rules
of Practice and Procedure,
Relating to Written Responses
to Commission Inquiries and the
Making of Misrepresentations to
the Commission by Applicants,
Permittees, and Licensees, and
the Reporting of Information
Regarding Character Qualifications

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1991;

Released: May 24, 1991

By the Commission: Commissioner Duggan issuing a separate statement.

1. The Commission has before it two petitions for reconsideration of our *Policy Statement and Order* in this proceeding, 5 FCC Rcd 3252, 55 Fed. Reg. 23082 (1990) (hereinafter referred to as *1990 Character Policy Statement*). The *1990 Character Policy Statement* generally broadened the previously enunciated range of licensee misconduct that would be considered relevant in judging the character qualifications of a broadcast applicant. We also required broadcast licensees to report adjudications of relevant misconduct to the Commission within thirty days of the final decisions in such cases. See 47 C.F.R. § 1.65(c).

2. The petition filed jointly by Media Access Project and Telecommunications Research and Action Center (hereinafter referred to as MAP) requests that we further expand the range of relevant misconduct and the scope of matters that must be reported to the Commission. The petition filed jointly by Chronicle Broadcasting Co., Post-Newsweek Stations, Inc., The Providence Journal Company, Shenandoah Valley Educational Television Corporation, and the Spartan Radiocasting Company (Joint Petitioners) requests that we ease the reporting burden imposed on licensees and clarify the reporting requirement.¹

A. The Range of Relevant Non-FCC Misconduct

3. MAP suggests that the Commission's inquiry into an applicant's character should include consideration of all civil judgments that involve misrepresentation, whether or not the misrepresentation is made to a governmental unit. It also contends that the Commission should consider convictions for non-serious as well as serious misdemeanors. Specifically, MAP argues that civil violations of law

involving misrepresentation raise substantial and material questions as to an applicant's propensity to violate FCC requirements such as sponsorship identification and lowest unit charge. It also argues that the Commission should not limit the relevance of misdemeanors based on whether the crime is "serious" or not because "the very same acts will be a felony in one state, a 'serious' misdemeanor in a second, and a 'non-serious' misdemeanor in a third." Rather, MAP believes the Commission should focus on the nature of the underlying misconduct, and it argues that convictions for "non-serious" misdemeanors like consumer fraud, election law violations, payment of gratuities to public employees, failure to file disclosure reports, and recordkeeping violations reflect adversely on an applicant's propensity to fulfill the obligations of a licensee.

4. MAP also urges us to consider unadjudicated allegations of misconduct in cases where the facts are undisputed. It states that plea bargains, consent decrees, and settlements often involve stipulations of fact that may be sufficient to raise substantial and material questions concerning an applicant's character, and such admissions should be considered by the Commission. Further, because the standard of proof that applies in criminal proceedings is higher than in Commission proceedings, MAP contends that criminal indictments raise substantial and material questions as to a licensee's character even where the defendant is acquitted. The commenters addressing MAP's suggestions oppose any expansion of the range of relevant misconduct.

5. *Discussion.* Our 1986 and 1990 policy statements identified the categories of non-FCC misconduct that are most clearly relevant to an applicant's qualifications. We continue to believe the public interest would not be served by expenditure of Commission and applicant resources on routine consideration of other, less relevant categories of misdeeds.

6. Specifically, as to civil matters, we continue to believe that judgments relating to fraudulent representations to a governmental unit or mass media related violations of antitrust or anticompetitive laws bear most directly on an applicant's qualification to be a broadcast licensee. We recognize that some civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications. Nevertheless, based on our experience, we believe that the category of civil misrepresentation is too broad to be presumptively relevant to a broadcaster's qualifications. We may, however, consider such matters on a case-by-case basis. Similarly, we do not believe that, as a general matter, misdemeanor convictions presumptively have relevance. In certain circumstances, misdemeanor convictions are more serious and may be relevant. Nevertheless, broadening the category of misdemeanors as suggested by MAP would effectively require that we routinely evaluate the relevance of virtually all misdemeanor convictions, and, in the vast majority of cases, would most probably lead to prolonged litigation without countervailing public interest benefits. We also continue to believe that allegations of relevant non-FCC related misconduct should generally be resolved by the forum in which the litigation is pending.² Where that litigation has ended in a settlement agreement, consent decree, or acquittal and there is no admission or finding of unlawful misconduct, we believe it is generally inappropriate for us to reach legal conclusions on the basis of any stipulated facts.³ The Commission generally does not have the expertise or resources to resolve questions of

state or federal law outside its principal area of jurisdiction, and it is generally more efficient to allow other forums to resolve such matters and for us to focus on adjudicated misconduct. As we indicated in the *1990 Character Policy Statement*, however, although we intend to be guided by these policies, we remain "free to exercise . . . discretion in situations that arise." 5 FCC Rcd at 3252, citing *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Co.*, 589 F2d 658, 666 (D.C. Cir. 1978).

B. Scope of Reportable Misconduct

7. Consistent with its suggestion that we broaden the range of relevant misconduct, MAP urges us to require applicants and licensees to report all civil and criminal violations of law involving misrepresentation, all misdemeanors, consent decrees, and indictments. In contrast, the Joint Petitioners and Cox, noting that we may consider "serious misdemeanor convictions in appropriate or compelling cases," seek clarification as to which misdemeanors are "serious" and therefore presumably reportable. The Joint Petitioners, as well as NAB and Cox, also suggest that we require reporting of adjudicated non-FCC misconduct only where a licensee principal (i.e., a person with an attributable interest in the licensee) is a named defendant in the adjudication.

8. *Discussion.* Although we may consider serious misdemeanor convictions in appropriate or compelling cases, consistent with our view that misdemeanors in the vast majority of cases are not relevant to our character concerns, we did not require that misdemeanor convictions be reported to us. We see no reason to change this decision. We will determine which misdemeanors are serious and the effect of any such convictions on a case-by-case basis as such matters are brought to our attention by concerned parties. Similarly, in light of our determination that civil misrepresentation not involving governmental units is not generally relevant, see paragraph 6, *supra*, we will not require reporting of such adjudications. In this regard, we note that applicants must report indictments, as well as other pending cases involving relevant misconduct, and, in appropriate cases, information on pending cases of relevant misconduct may form the basis of a condition on the grant of the application. *1990 Character Policy Statement*, 5 FCC Rcd at 5253. In the case of licensees for which no applications are pending, however, there is no grant upon which to place such a condition. Thus, we reject MAP's proposal, and we will continue to require licensees to report only adjudicated relevant misconduct under the new section 1.65(c).

9. We also reject Joint Petitioners' request that principals of a licensee be required to report adjudicated non-FCC misconduct only if they are a named defendant. We see no rational basis for such a limitation. In our attribution rules, we generally determined that officers, directors and persons holding a five percent or greater voting interest may exercise influence or control over a licensee. See 47 C.F.R. § 73.3555 Note 2; see also *Attribution of Ownership*, 97 FCC 2d 997 (1984).⁴ In light of this conclusion, it logically follows that such persons may also affect management of a non-licensee company. There is no reason to assume, for example, that a director of a non-licensee company convicted of misconduct was not in a position to influence that company's behavior unless he or she was a named defendant. Accordingly, as is our practice with the reporting of non-FCC misconduct in the context of ap-

plications, licensees will be required to report non-FCC misconduct involving any persons holding cognizable interests (as defined in section 73.3555 Note 2) in both the licensee and the non-licensee found to have committed the misconduct.⁵ Whether such reported misconduct will affect the licensee's character qualifications will continue to be determined on a case-by-case basis,⁶ taking into account, *inter alia*, the involvement, if any, in the misconduct of the licensee principal involved.

C. Timing of the Reports Required by Section 1.65 (c)

10. The Joint Petitioners contend that reporting adverse adjudications of relevant misconduct within 30 days of the adjudication imposes a substantial burden.⁷ They argue that licensees need more time to monitor and report on their own litigation activities and those of any person or entity holding an attributable interest in the licensee. For corporate licensees with outside directors and/or other business interests and for non-commercial licensees with large governing boards, they claim that considerable effort will have to be expended to monitor litigation involving a large number of diverse and often far-flung persons and enterprises. To ease the burden of continually monitoring such litigation, the Joint Petitioners suggest that the Commission require only annual litigation reports, filed at the same time as the annual ownership report. In reply, MAP concedes that less timely reports may be appropriate for certain types of misconduct, but it argues that felony convictions are so significant that they should be reported within the 30 day time frame.

11. *Discussion.* Section 1.65(c) requires permittees and licensees to report final adverse adjudications of misconduct that would be reportable on an application for renewal.⁸ Under the *1990 Character Policy Statement*, renewal applicants will be required to report adverse final action taken by any court or administrative body with respect to the applicant or parties to the application relating to any felony, mass media related antitrust or unfair competition, criminal fraud, fraud before another governmental unit, or discrimination. We recognize that in a relatively small number of cases, the reports required by section 1.65(c) may require the repeated monitoring of a large number of persons and the business entities with which they are associated, including firms that are otherwise unrelated to the licensee. We are also not unmindful of the commenters' concern that the failure to make timely reports of relevant adverse adjudications may constitute a violation at least as serious as the adjudicated wrongdoing.

12. In these circumstances, we believe that the Commission's regulatory goals would not be adversely affected by requiring the reports to be filed within 90 days of the time a permittee or licensee becomes knowledgeable of the adjudicated misconduct. In this regard, permittees and licensees have an obligation to make reasonable, good faith efforts to become informed of reportable adjudications of relevant misconduct. The additional time will give permittees and licensees the opportunity to focus on the filing of complete and accurate reports, without unduly impeding the commencement of whatever action the Commission deems appropriate in a particular case. Moreover, if the Commission should learn of a relevant adverse adjudication through other means, e.g., by complaint or press reports, we would not necessarily await the filing of the report before taking appropriate action, in-

cluding requesting details of the adjudication from the permittee or licensee. Section 1.65(c) is being amended accordingly.

D. Other Matters

13. *Comparative Consideration of Character.* MAP suggests that we consider non-disqualifying misconduct in comparative proceedings. It argues that our present policy not to do so is irrational, because "an incumbent licensee convicted of a non-disqualifying 'non serious' or drug misdemeanor [will] always receive a renewal expectancy as against a never-convicted challenger," and "[i]t is similarly illogical never to consider such misconduct, even convictions on multiple counts, in deciding which of two otherwise identical applicants for a new station is best qualified to serve the public."

14. We continue to believe that character is essentially a matter of an applicant's basic qualifications. Our experience has been that there is little to be gained from comparative consideration of non-FCC related misconduct that is insufficient to warrant disqualification. Such matters tend to delay and complicate comparative hearings more than to help select the comparatively superior applicant. Thus, as we determined in the *1986 Policy Statement*, the public interest is better served by eliminating such considerations from comparative proceedings. See *Alden Communications Corp.*, 3 FCC Rcd 5047 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 6601, 6602 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 5413 (1989), *aff'd.*, D.C. Cir. 89-1488 (Oct. 30, 1990)(mem.). FCC-related misconduct will, however, continue to be relevant to a renewal applicant's ability to obtain a renewal expectancy. See *1986 Policy Statement*, 102 FCC 2d at 1232 n. 125.

15. *Conditions on Grants.* MAP notes that although the Commission has the discretion to condition grant of an application on the outcome of pending proceedings in other forums, it has rarely exercised this power. To remedy this, MAP suggests that the Commission announce a new policy of deferring action on applications where appropriate and specifically conditioning all grants on the review of any subsequent adjudication of potentially disqualifying conduct, including misconduct by station assignors or transferors.

16. The *1990 Character Policy Statement* indicated that, in appropriate cases, we would condition grants on the outcome of pending proceedings in other forums. We do not believe it would be appropriate to adopt a policy of blanket conditions in all cases or to adopt a general deferral policy. Rather, our policy is to review all such cases on their merits in determining whether a condition is appropriate and the parameters of any such conditions. We believe that this approach best balances the Commission's concern with character qualifications with the need to process applications expeditiously and to ensure prompt service to the public.

17. *Section 312 (a).* Cox argues that midterm reports of adverse adjudications are unnecessary as the Communications Act does not empower the Commission to revoke a license on the basis of such adjudications. Section 312(a)(2) provides that the Commission may revoke a station license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." 47 U.S.C. § 312(a)(2). Cox contends that the

terms of this provision are limited to situations in which the relevant "conditions" were in existence prior to a grant but were unknown to the Commission.

18. We believe the provision is substantially broader in scope, permitting the revocation of a license for "conditions" occurring during the license term. See *Radio Para La Raza*, 27 RR 2d 836, 840 (1973) (section 312(a)(2) permits the Commission to look at events following the grant of an application); cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, n.3 (1969) (a requirement of operation in the public interest is implicit in section 312(a)(2) revocation authority). Section 312(a)(2) is thus broad enough to support a revocation of license where misconduct adjudicated during the license term would have been sufficient to support the denial of an initial license or renewal if that adjudication had been concluded prior to the grant of the initial license or renewal.

E. Conclusion

19. Accordingly, IT IS ORDERED that the Petition for reconsideration filed jointly by the Media Access Project and the Telecommunications Research and Action Center IS DENIED.

20. IT IS FURTHER ORDERED that the Petition for Reconsideration filed jointly by Chronicle Broadcasting Co., Post-Newsweek Stations, Inc., The Providence Journal Company, Shenandoah Valley Educational Television Corporation, and the Spartan Radiocasting Company IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

21. IT IS FURTHER ORDERED that section 1.65(c) of the Commission's rules IS AMENDED as set forth in the Appendix hereto, EFFECTIVE 30 days after publication in the Federal Register.⁴

22. The action herein is taken pursuant to section 4(i), 303(r), 308(b), 312, 319(a) and 403 of the Communications Act of 1934, as amended.

For further information regarding this proceeding, contact Martin Blumenthal, Office of General Counsel, (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 of Title 47 of the C.F.R. is amended as follows:

1. The authority citation for Part 1 continues to read: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, 303; Implement, 5 U.S.C. § 552, unless otherwise noted.

2. Section 1.65 is amended by revising paragraph (c) to read as follows:

§ 165 Substantial and significant changes in information furnished by applicants to the Commission.

* * * * *

(c) All broadcast permittees and licensees must report to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with an application for renewal as reflected in the renewal form. The report required by this subsection must be filed within 90 days of the date that the permittee or licensee becomes knowledgeable of any such reportable adverse findings or adverse final actions not previously reported to the Commission. Permittees and licensees bear the obligation to make reasonable, good faith efforts to become knowledgeable of any such reportable adjudicated misconduct.

FOOTNOTES

¹ Comments were filed by the National Association of Broadcasters (NAB); the National Broadcasting Company, Inc. (NBC); EZ Communications, Inc. (with Great American Television and Radio Company, Inc., McGraw-Hill Broadcasting Company, Inc., and Renaissance Communications Corporation); and Cox Enterprises, Inc. (with HSN Communications, Inc.). LIN Broadcasting Corporation and Vermont ETV, Inc. filed statements in support of the Joint Petition. MAP filed reply comments.

² We retain the discretion to condition grants on the outcome of pending litigation involving relevant non-FCC related misconduct. See 1990 *Character Policy Statement*, 5 FCC Rcd at 3253.

³ A plea bargain generally involves a plea of guilty to one or more criminal charges. As a result of that plea, the defendant is convicted of the crime. Such a conviction is an adjudication for purposes of applying our character policy.

⁴ Note 2 provides for exceptions to this general rule for: minority interests in corporations if there is a single holder of more than 50% of the voting stock; certain investment companies, insurance companies and bank trust departments; insulated limited partnership interests; and certain officers and directors of diversified corporations or parent corporations.

⁵ With respect to Cox's suggestion that an exemption be created for licensee shareholders who hold their shares "for investment purposes only" and are "not materially involved in the day-to-day operations of the station," such an exemption would be inconsistent with our attribution rules, which incorporate a presumption that owners of a five percent or greater voting interest are generally in a position to influence a licensee.

⁶ See 1990 *Character Policy Statement*, 5 FCC Rcd at 3252 & n. 4; 1986 *Character Policy Statement*, 102 FCC 2d at 1227-29.

⁷ We note that the Joint Petitioners also asked the Office of Management and Budget (OMB) to deny approval of the reporting requirement under the Paperwork Reduction Act. OMB approved the reporting requirement on August 2, 1990. (OMB Control No. 3060-0449).

⁸ Applicants are required to update their applications by reporting the initiation or adjudication of relevant actions within 30 days of their occurrence pursuant to section 1.65(b). That requirement remains unchanged by this Memorandum Opinion and Order.

⁹ Licensees are currently required to file section 1.65(c) reports within 30 days of the relevant adjudication. In light of our decision to increase the time interval for such reports, we will not enforce the existing rule prior to the effective date of the revised rule. The amendment of the rule is not a "substantive

or material modification" that would require further approval from OMB under the Paperwork Reduction Act. See 5 C.F.R. § 1320.11(h).

Separate Statement of Commissioner Ervin S. Duggan

In re: Policy Regarding Character Qualifications in Broadcast Licensing

Although I join my colleagues in adopting this item to modify our character policy for broadcast licensees, I am troubled by one aspect of our Order. Specifically, I am concerned by our decision to exclude consideration of civil consent decrees, even when misconduct related to mass media issues is clearly involved. Two recent consent agreements entered between the Federal Trade Commission and two telemarketers providing 900 lines aimed at children, for example, involve conduct that I would find relevant to an applicant's character to become an FCC licensee. Such consent decrees are often entered for reasons of administrative convenience even when there is no doubt that actual misconduct occurred. Should we be officially blind to such occasions?

I take some comfort in the fact that we remain "free to exercise ... discretion in situations that arise." But since certain types of civil consent decrees are not covered by our Character Policy reporting requirements, we must rely upon outside parties to report such incidents to the FCC. Wouldn't the public interest be better served by requiring reporting of such matters? The alternative is to risk the danger that we may grant a license without ever knowing of misconduct that might well sway us if we but knew.

FOOTNOTES TO STATEMENT

¹ See, e.g., *Communications Daily*, "FTC Obtains 2 Consent Agreements with Providers of 900 Ads for Kids," May 9, 1991 at 1.

² 1990 *Character Policy Statement*, 5 FCC Rcd 3252, 3252 (1990).