Report of the Subcommittee on Legal Opinions of the Transactional Practice Committee of the Federal Communications Bar Association(1)

Foreword

Communications lawyers are frequently asked to give legal opinions, typically in connection with various transactions. The buyer of a business regulated by the Federal Communications Commission (FCC or Commission) may expect to receive an opinion from the seller's counsel. A lender or an investor may expect to receive an opinion before it lends money or makes an investment. Buyers, lenders, underwriters, and investors all recognize that transactions with such businesses require special diligence because of their regulation by the FCC.

Inspired by the effort of the American Bar Association Business Law Section to develop a Legal Opinion Accord for certain commercial transactions, the Federal Communications Bar Association (FCBA) created the Ad Hoc Committee on Opinion Letters (Committee) to develop similar materials that might be useful to practitioners in drafting and negotiating opinion letters for FCC-related transactions.(1) The Committee met over the course of several years, attempting to reach a consensus on the scope and language of opinions in FCC-related transactions. The Committee recently became a subcommittee of the FCBA's Transactional Practice Committee. This Report incorporates comments from the Transactional Practice Committee's review of the draft report, as well as comments from outside practitioners solicited by the Committee.

This Report is intended to cover all businesses whose operations are at least in part regulated by the FCC. It is written to be useful to counsel who are unfamiliar with FCC practice as well as those who routinely practice in the area.

This Report is intended to facilitate negotiations between opinion givers and opinion recipients. In this regard, it is worth emphasizing that the cost and effort expended in preparing and negotiating an opinion should be commensurate with the value of the transaction and the importance to the business of the FCC licenses involved. This Report is not styled as an "accord," but practitioners may choose to incorporate into their opinions selected definitions from portions of this document.

This Report also assumes that all parties understand that the factual underpinnings of certain opinions—for example, the existence of specified FCC licenses—are based on counsel's examination of records in the public reference rooms of the FCC as of a certain date. Communications practitioners are, however, all too aware of the vagaries of the FCC's public reference rooms. The files in the FCC's public reference rooms can be incomplete. The public reference rooms also do not contain all records of the FCC that are "publicly available" as a matter of law under the Freedom of Information Act.(2) The Committee believes that reasonable due diligence does not require the submission of a Freedom of Information Act request.

This Report defines a few terms for ease of reference. The opinion giver's client is referred to as the "Company." This Report often uses the term "licenses" as a broad term that includes FCC licenses, permits, and authorizations. Communications practitioners know that companies act not only under licenses, but also under construction permits, pursuant to special temporary authorization, and pursuant to authorizations such as those under Section 214 of the Communications Act of 1934(3) for certain common carriers. The Committee intends that the term "licenses" should be interpreted broadly, to encompass all FCC licenses, permits, and authorizations, regardless of the label. In several opinions, however, the Committee uses the term "FCC Licenses" as a narrowly defined term, limited to those licenses listed on a schedule.(4) Finally, the term "Communications Act" should be defined to mean the Communications Act of 1934 as amended; the rules and regulations of the Commission; and the written orders, policies, and decisions of the Commission and the courts interpreting the above.

This Report is divided into four parts. Part I deals with the status of the Company's FCC licenses generally, regardless of any transaction. Part II deals directly with the transaction and any FCC approvals needed for the transaction. Part III deals with pending litigation that might affect the FCC licenses or the Company's ability to retain the licenses. Part IV discusses requests for opinions concerning the Company's compliance with relevant communications laws and regulations. This Report contains recommended language and commentary in connection with each opinion. The commentary summarizes the Committee's reasons for recommending the language and addresses the issues that the

opinions may present. Just as important, the commentary refers to opinions or language that the Committee rejected as unreasonable, impractical, or ambiguous.

The *ABA Accord* itself is likely to be a very helpful guide for communications opinions. In particular, the Committee recommends that counsel review the discussions of assumptions and definitions that are included in the *ABA Accord*.(5) Counsel should also note the admonition to avoid rendering an opinion that, while in technical compliance with the *ABA Accord*, is inconsistent with the opinion giver's actual knowledge.(6) Attorneys also may want to review their ethical obligations to obtain informed consent from their clients for the delivery of an opinion.(7)

Any opinion letter will contain certain assumptions, limitations, and qualifications. The sample opinion letter at the end of this Report contains language that communications practitioners may find useful.

Perhaps the most important assumption in communications law opinions concerns the authenticity and accuracy of documents obtained from the FCC, as lawyers typically rely on copies of licenses and not on originals or certificates from the FCC. In general, lawyers should obtain copies of critical documents directly from the Commission. If such a document is not available directly from the FCC, counsel may reasonably rely on a copy obtained elsewhere if it bears appropriate acknowledgement of receipt by the FCC or if there is other suitable evidence that the FCC properly issued the document.

Many communications law opinions also contain the explicit statement that counsel has not actually inspected the facility and that the opinion does not extend to technical matters, because counsel cannot be expected to know what actually occurs at the client's facility. To the extent actual operations are relevant, counsel should be permitted to rely on a certificate of fact from a responsible individual.

The Committee would appreciate receiving comments that it may consider in revising future editions. We gratefully acknowledge the valuable contributions and input offered by many communications practitioners over the last few years. Any errors are, of course, our own.

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I.Opinions Relating to FCC Licenses without Relation to Any Specific Transaction

A. Licenses Held

Recommended Language (Option 1):

The Company holds the FCC licenses, permits, and authorizations specified on Exhibit A (the "FCC Licenses").

Company counsel is often asked to provide an opinion about the FCC Licenses held by the Company. If no legal issue or professional judgment is involved, the information may be furnished in the form of a factual confirmation as

opposed to a legal opinion. For example, if a listing of licenses has been prepared by the Company, counsel may be able to confirm that all of the licenses appearing on that list have in fact been issued to the Company and have not expired.

This opinion may often, however, require counsel to exercise some legal judgment. For example, the FCC does not issue certificates of good standing, as do Secretaries of State, upon which counsel may rely in giving a corporate good standing opinion. The determination whether the Company holds particular licenses is thus akin to a real estate title search; in many cases, no license document exists designating the Company as the holder. Instead, the actual license may have been issued to a predecessor of the current license, and counsel may need to track transfers of control, renewals, and name changes in order to establish the current holder.

Frequently, this opinion is requested in the form of "Exhibit A lists all of the FCC licenses issued to [or held by] the Company." Such an opinion asks for more than the above; it asks counsel to ensure that they have compiled a list that includes every FCC license issued to the Company. Unfortunately, such a list cannot be compiled to an opinion level of certainty. The FCC has no comprehensive, complete compilation of licenses that would permit counsel to be sure that they have included all of the licenses issued by the FCC to a given company. Moreover, even conscientious officers of a company are not always aware of all the FCC licenses a company holds. Even with the exercise of reasonable diligence, counsel cannot be sure that a list is exhaustive, and the Committee, therefore, recommends that an opinion not be given in this broad fashion. For that reason, we have recommended defining "FCC Licenses" to comprise only those listed on an exhibit or schedule, with no opinion whether the list is all-inclusive.

The Committee is of the view that this recommended formulation should ordinarily be sufficient. In normal cases, the opinion requires that counsel confirm that the relevant file records for each FCC license reflect the Company as the holder of the FCC license.(8) The recipient of the opinion should ensure that the list contains all the FCC licenses it considers to be material to the transaction.

This opinion goes only to the holding of the licenses by the Company. It does not address whether there are limitations on the holder's ability to use the license itself, the subject matter of which may be covered by the "full force and effect" opinion and the "finality" opinion. As discussed in Part I(B) below, an FCC license will not be in full force and effect if an FCC-imposed condition precedent has not been satisfied, for example, a construction permit that by its terms is not to become effective until another station changes frequency. Even so, the Company may lawfully hold the license. Likewise, the pendency of a challenge to the underlying validity of the license itself, but not to the holding of the license by the Company, does not impair the valid holding of the license. If, in contrast, the order granting or assigning the license to the Company is not final, giving the "validly holds" opinion implies that any pending petitions or appeals of that order are without merit. Nor does this opinion address whether the licenses are sufficient for the purposes intended.(9)

Recommended Language (Option 2):

The Company validly holds the FCC Licenses, permits, and authorizations specified on Exhibit A (the "FCC Licenses").

This opinion is the same as the opinion in Option 1 above, with the addition of the word "validly." In contrast to the opinion in Option 1, the addition of the word "validly" necessarily involves the exercise of legal judgment and will require additional diligence and care. In the Committee's view, the "valid" holding of the licenses means (1) that the licenses have been issued to the Company through the means of regular Commission procedures applied in conformity with prior Commission practice and (2) that there is no legal basis to conclude that the Company cannot hold one or more of the licenses as a matter of law. Because there may be misinterpretations of the scope of the term "valid," as discussed below, some practitioners may prefer to avoid the generalized term "valid" and simply address the two issues listed above.

This opinion is possibly—but in the Committee's view, erroneously—subject to much broader interpretations. A number of situations illustrating some of these broader interpretations are discussed below, along with an explanation of the Committee's rationale for rejecting these broader interpretations.

First, it is possible that defects in the chain of title of a license by a prior licensee may render it void, even though the assignment to the current holder has been granted by final order. In certain services, for example, a license automatically expires if certain construction or operational requirements are not satisfied by a date certain. It is theoretically possible that the failure by a prior licensee to comply with these requirements could render the license a nullity, even though no action was taken at the time, and the license has thereafter been assigned to one or more subsequent parties by final order. In the Committee's view, the likelihood of the Commission declaring a license void in such a circumstance is remote, and the Commission's authority to do so is uncertain. Moreover, the determination whether such conditions were complied with in timely fashion is ordinarily not within the competence of counsel, and any efforts to make such a determination would entail significant expense. Therefore, in the Committee's view, this opinion should not be read to mean that the opinion giver is opining that there have been no defects in the chain of title prior to the issuance of the license to this licensee.

Second, it is possible that the Company has not operated in compliance with the terms of the license and has made factual misrepresentations to the Commission in the application for the license. Alternatively, the Company may have otherwise engaged in conduct that, if brought before the Commission, might lead to proceedings to revoke its license. The "validly holds" opinion, in the Committee's view, should not be read to suggest to the recipient that counsel has undertaken any diligence—other than the diligence described above—concerning such matters or is opining that no such state of facts exists. As set forth in the foreword above, if counsel has actual knowledge of a violation that renders the Company unfit to hold the FCC licenses, counsel should not give this opinion without an appropriate qualification. Even actual knowledge of noncompliance with operational rules of the Commission should not render counsel unable to give this opinion in the absence of a pending or overtly threatened proceeding to revoke the license. If, however, there is a pending proceeding challenging the Company's qualifications to hold the license, the "validly holds" opinion is an implicit opinion that the proceeding will be resolved in such a way that will not imperil the Company's holding of the FCC license.(10)

Third, it is possible that the Commission received timely filed petitions to deny or informal comments against an application that were not placed in the appropriate location in the Commission's files. If the Commission failed to take these petitions or comments into account in granting the application, there is some precedent to support the notion that the Commission may revisit the grant of the application even after the normal finality periods have expired.(11) Nevertheless, in the Committee's view, counsel is entitled to rely on the presumption that the Commission properly follows its own procedures. If the publicly available files of the Commission reflect no unaddressed petitions or comments, and counsel has no actual knowledge of any such filings not reflected in the Commission's files, counsel can give this opinion and should not be understood to be warranting the accuracy of the Commission's files or procedures.

The Committee believes that in normal course, this opinion should imply that the diligence identified in Option 1 above has been completed. The opinion should also imply that: (1) counsel has reviewed the licensee's ownership structure, which includes both direct and indirect interests in the licensee, and determined that no changes have taken place since Commission approval that would have required Commission consent, (2) counsel has made reasonable inquiry of the Company to ascertain the Company's compliance with any applicable provisions of Section 310(b) of the Communications Act(12) concerning alien ownership and with any applicable ownership limitations of the rules (*e.g.*, multiple ownership, cross ownership, any ownership caps), and (3) counsel has reviewed the Commission's publicly available files and its own files and determined that no petitions or comments relating to the most recent grant or assignment of the license to the Company appear that were not addressed by the Commission.

B. Full Force and Effect

Recommended Language:

The FCC Licenses are in full force and effect.

This opinion both complements and slightly overlaps the "Licenses Held" opinion discussed in Part I(A) above. It

affirms that there are no limitations on the holder's ability to use the licenses in accordance with their terms.

In the Committee's view, the term "full force and effect" means only the following: (1) the orders issuing the FCC licenses have become effective under 47 C.F.R. § 1.102;(13) (2) all express FCC-imposed conditions precedent have been satisfied; (3) no stay of effectiveness has been issued; and (4) the FCC licenses have not expired by their own terms or been invalidated or modified by any subsequent FCC action. Some practitioners may prefer to avoid the generalized term "full force and effect" and simply address each of the four issues listed above.

The second element of the four factors identified above refers to FCC-imposed conditions precedent. The opinion giver should recognize that not all conditions that may apply to a license are conditions precedent. Broadcast licenses, for example, may contain conditions regarding RF radiation, tower lighting, divestiture of other broadcast interests, and the like. Some of these are conditions precedent to the effectiveness of the grant, but others may be merely ongoing operational requirements. Additionally, some permits which are affected by rulemaking proceedings contain the condition that program testing cannot commence until a frequency switch by another station has occurred; others may contain a condition that construction is at the permittee's risk until appeal, often by a losing applicant in a comparative proceeding, has been concluded.

While confirmation of the third elementÄabsence of a stayÄmay entail some of the same due diligence as a finality opinion, in the Committee's view, the "full force and effect" opinion neither includes nor implies any opinion as to finality or sufficiency of the licenses, whether the licenses are subject to special conditions (other than conditions precedent), or whether the Company is operating in compliance with the terms of the licenses. Each of these subjects is separately addressed elsewhere in this Report.

C. Final Order

In normal course, counsel is not asked to opine whether the grant of all of the Company's FCC licenses has become final. In particular circumstances, however, such as when the FCC licenses have been issued in the last year or two or are subject to recent controversy, it may be appropriate to give such an opinion. If this is the case, the opinion should be governed by the considerations discussed in Part II(C) below.

D. Sufficiency of Licenses

Recommended Language:

1. First Approach:

The FCC Licenses include all FCC licenses, permits, and authorizations necessary for the Company to operate a [type] station on Channel [number] in [community of license].

2. Second Approach:

The FCC Licenses include all FCC licenses, permits, and authorizations necessary for the Company to conduct its business in the manner in which we have been advised it is currently being conducted.

Counsel may be asked to give an opinion that the FCC licenses held by the Company are all of the FCC licenses necessary for the Company's operations. A determination of which FCC licenses are needed for a business to conduct its operations is generally not within the technical expertise of counsel. Counsel should not be requested to render an opinion that directly or indirectly expresses a view about the actual operation of the station. Counsel must be able to rely on information provided by others and make that disclosure in its opinion letter. In general, counsel should be expected to render an opinion only on whether the Company has the FCC authorizations necessary for a specified, identified purpose.

The Committee has outlined two approaches above. The first approach provides the recipient with the comfort that the FCC licenses permit the Company to carry on its core business operations. It should generally be sufficient in cases in which the business is one in which there is a "core" FCC license without which one cannot lawfully carry on the business, even if there are other FCC licenses that may be helpful or typically used by businesses in that industry. Examples include radio and television broadcasting, cellular telephone systems, and domestic communications satellites, which require only a single license to engage in the business, even though each may have additional licenses (*e.g*., broadcast auxiliaries, common carrier microwaves, and the like).

In these cases, it is generally sufficient for counsel to render an opinion that the FCC licenses are sufficient to enable it to conduct that business on a particular frequency and for a particular geographic location. This is the first approach.

Even though the business may be one with a single "core" FCC license, in particular situations it may be appropriate to include in the first approach an opinion that covers other licenses. For example, the right to use a given call sign may be of great importance to the purchaser of a radio station; the existence of translators or boosters may be important to a broadcast station's revenue stream; the existence of specific microwave links may be important to a cellular system. In the Committee's view, it is the responsibility of counsel requesting the opinion to identify any other features that are material to its client's participation in the transaction and to request a specific opinion to the effect that the listed licenses authorize those features. The opinion giver should not be expected to know what features may be material to a purchaser's decision to buy or a lender's decision to extend credit. If specifically identified by the opinion recipient, therefore, other authorizations may properly be added to the opinion using the first approach.

Where there is a "core" FCC license, the Committee is of the view that for many of the reasons described in the commentary accompanying Part IV, the second approach is generally inappropriate. On the other hand, in many business enterprises, there may be no "core" FCC license without which that kind of business cannot lawfully be conducted. However, there may be FCC licenses that are in some measure important to the operation of the business. A prominent example is cable television where the "core" licenses are issued by the local franchising authorities, but Community Antenna Relay Service (CARS) microwave licenses issued by the FCC may be material to a given system's efficient operation. In addition, many noncommunications businesses, in the manufacturing or distribution industries, for example, may use business radio licenses to increase their efficiency where no license is required to conduct the underlying business operation. In these cases, the first approach generally would be meaningless. Therefore, the second approach is recommended.

In order to render the opinion in the second approach, counsel should require the Company to complete a questionnaire about its business operations and have it certified by a partner or officer. Counsel should not ask for a certificate that merely identifies all licenses held by the Company. The questionnaire ideally should seek specific factual information that will enable counsel to determine that the Company's operations do not require licenses other than those on the schedule.(14) The party completing the questionnaire should be someone with the requisite knowledge to answer the questions asked, seeking the assistance of an engineer, if necessary.

E. Conditions on Licenses

Recommended Language:

The FCC Licenses are not subject to any conditions outside the ordinary course [or are subject to the following conditions outside the ordinary course].

Every FCC license is issued subject to general conditions, whether explicit or implicit. Some conditions are imposed only by the Communications Act and the Commission's rules; others may be printed or typed on a Commission form acknowledging or granting a license. It is not practical or feasible to list all such conditions in an opinion letter. The term "conditions outside the ordinary course" ordinarily will not embrace either (1) conditions generally applicable to stations of this type by virtue of the Communications Act and the Commission's rules, (2) conditions that are printed on the form by which the Commission evidences the grant of the licenses, or (3) conditions that are routinely added to such a form.

As in Part I(A) above, some lawyers may feel that this "opinion" does not raise any legal issues or call for the exercise of any professional judgment by counsel and that it is, therefore, more appropriate for counsel to furnish the information in the form of a factual confirmation. Other lawyers, however, may disagree. For example, it requires some exercise of judgment and experience to determine whether a condition that the FCC has added to a form is routine and therefore not "outside the ordinary course."

F. Call Signs

Recommended Language:

The Company has all necessary authority from the FCC to use the call signs listed on Exhibit A.

While the Committee has included this opinion, the Committee believes that it is of little, if any, utility. If requested, counsel may prefer to put this information in the form of a factual confirmation as opposed to a legal opinion. An opinion that the Company has the necessary authorization from the FCC to use a call sign means nothing more than that the FCC has assigned that particular call sign to the station involved. It does not mean that the use of the call sign by the Company is not subject to challenge by third parties under other laws, such as state and federal trademark laws. While the FCC previously refused to issue confusingly similar call signs to broadcast radio stations in the same market, the FCC no longer follows this practice and has no rules prohibiting the use of confusingly similar call signs.

Moreover, in light of the FCC's limited requirement for use of a call sign—in the case of broadcast stations, only as part of its top-of-the-hour station identification—greater value may attach to other logos or slogans (*e.g.*, "Magic 101") than to the station's FCC call sign. Therefore, if an opinion recipient is concerned about whether a Company's use of a call sign is subject to challenge by another station in the market, it should ask the Company whether the station's call sign has been registered as a service mark with the United States Patent and Trademark Office and whether the Company has received notice of any claim of infringement.

G. Renewal

Recommended Language:

The most recent renewal of the FCC Licenses has been granted by the Commission in the ordinary course.

In the Committee's view, this opinion is appropriate in the case in which (1) the application for renewal of the licenses held by the Company was filed in timely fashion; (2) the Commission requested no further information; (3) no competing applications, petitions to deny, or informal objections were filed before the date that the application was granted; and (4) the renewal was granted by the Commission staff on delegated authority for the full-license term without the imposition of forfeiture, sanctions, or other conditions outside the normal course. Counsel should review the license renewal authorization itself, which may reveal information relevant to the issue of whether the licenses were renewed in the ordinary course, and all available files and records at the FCC.

Other situations may call for different opinion treatment. First, the renewal application may be pending. Second, the licenses may have been renewed after the FCC resolved a petition to deny or an informal objection in favor of the Company, or after the FCC dismissed a competing application. The Committee believes that specific language should be used to address each situation.

Recommended Language:

1. Application Granted, but After Disposition of

Petitions:

The application for renewal of the FCC Licenses held by the Company was filed on [date] and granted on [date] for a period expiring [date]. This is the standard expiration period pursuant to the FCC's rules. The FCC's rules allowed the filing of competing applications or petitions to deny on or before [date] and the filing of informal objections before the date that the application was granted. A [competing application, petition to deny, or informal objection] was filed on [date]. The [application, petition, or informal objection] was dismissed [and all issues raised by the petition or informal objection were resolved in favor of the Company].

2. Pending Application (No Petitions Filed):

An application to renew the FCC Licenses held by the Company was filed on [date] and remains pending. The FCC's rules permit the filing of competing applications and petitions to deny on or before [date] and the filing of informal objections any time up until the date that the application is granted. If no competing applications or petitions to deny are filed, then the application to renew the licenses will be ripe for a grant after [date]. Any informal objections filed while the application to renew the licenses remains pending would have to be resolved before the application could be granted.

3. Pending Application:

An application to renew the FCC Licenses held by the Company was filed on [date] and remains pending. The FCC's rules permit the filing of competing applications or petitions to deny on or before [date] and the filing of informal objections up until the date that the application is granted. There are no known competing applications, petitions to deny, or informal objections affecting the application for license renewal on file with the FCC. The application for license renewal is ripe for a grant, although any informal objections filed while the application for renewal of license remains pending would have to be resolved before the application could be granted.

II.Transaction-Specific Opinions

This part is divided into three subparts. Subpart (A) addresses the situation in which a specific FCC consent is needed in order for the transactions to be consummated at the closing, and subpart (B) covers the case where no consent is needed for the transactions to be consummated at the closing. In general, one would not give both (A) and (B) in the same opinion. Finally, subpart (C) addresses the lawfulness of the transaction as a whole, including obligations that are intended to be performed after the closing date.

A. If Consent Is Required:

1. Grant of Consent

Recommended Language:

The FCC has granted its consent to the [describe the aspect of transaction requiring FCC approval, for example, assignment or transfer of control of the FCC Licenses] without the imposition of conditions outside the ordinary course (or subject to the following conditions outside the ordinary course).

In the Committee's view, this straightforward opinion is appropriate for borrower's counsel to give to lender's counsel. It is probably not appropriate in a sales transaction unless both buyer's counsel and seller's counsel render the opinion to each other, which is redundant and unnecessary. This opinion requires a review of the FCC consent (on a form such

as Form 732(15) for the broadcast services or by public notice) and the underlying assignment or transfer of control application. Again, counsel may prefer to put this information in the form of a factual confirmation as opposed to a legal opinion.

Every consent is issued subject to general conditions, whether explicit or implicit. Some are imposed only by the Communications Act and the Commission's rules; others may be printed or typed on a Commission form, acknowledging or granting consent. It is not practical or feasible to list all such conditions in an opinion letter. Instead, the Committee concluded that the term "conditions outside the ordinary course" usually will not embrace the following: conditions generally applicable to stations or transactions of this type by virtue of the Communications Act and the Commission's rules, conditions that are printed on the form by which the Commission evidences its consent, and conditions that are routinely added to such a form.

Such conditions, even though not "outside the ordinary course," may nonetheless be of great significance, or may have particular application to the licensee or to the transaction in question. However, this opinion does not require their disclosure. For example, a consent to assignment or transfer of control ordinarily requires the transaction to be consummated within a certain period of time. This condition is not "outside the ordinary course," even though failure to consummate within the required time period could render the consent ineffective. Likewise, the expiration date of a construction permit or of a license, although material, is not outside the ordinary course if the term of the permit or license is the same as that ordinarily applicable to similarly situated facilities. This may be true even of certain so-called "special conditions" that are typed or printed on the face of the consent or authorization in question.

Examples of conditions outside the ordinary course include conditions that: (1) require a licensee to divest itself of an interest that is inconsistent with the FCC's rules; (2) grant a renewal term shorter than the maximum permitted under the rules; (3) limit the facility's technical operation; or (4) impose Equal Employment Opportunity requirements.

Counsel is not customarily requested to opine that the consent has been "validly" issued. Such an opinion may in some circumstances be appropriate, depending upon such factors as the existence of challenges to the consent, the importance of the license in question, and the size of the transaction. If it is to be given, the concept of validity should be governed by the same considerations as are applicable to the "validly holds" opinion discussed at Part I(A) above, with one additional consideration: validity of consent can depend, in theory at least, upon the qualification of both buyer and seller. Therefore, it is appropriate for the opinion giver to assume the due qualification of the other party to the transaction. In that case, such an assumption should be explicitly called to the recipient's attention. Alternatively, one might request an opinion from counsel to the other party, and could instead rely upon that opinion.(16)

2. Consent in Full Force and Effect

Recommended Language:

The FCC's consent is in full force and effect.

In the Committee's view, the term "full force and effect" means only the following: (1) the order consenting to the action requested has become effective under 47 C.F.R. § 1.102;(17) (2) all express FCC-imposed conditions precedent have been satisfied; (3) no stay of the consent has been issued; and (4) the consent has not expired of its own terms, been invalidated, or been modified by any subsequent FCC action. Some practitioners may prefer to avoid the generalized term "full force and effect" and simply aver that the four factual statements listed above are correct.

The second element of the four factors identified above refers to FCC-imposed conditions precedent. The opinion giver should recognize that not all conditions that may apply to a Commission consent are conditions precedent. For example, the FCC typically requires that it be given notice within a specified time after consummation of the transaction.

While confirmation of the third elementÄabsence of a stayÄmay entail some of the same due diligence as a finality opinion, the Committee's view is that the "full force and effect" opinion neither includes nor implies any opinion as to finality or sufficiency of the consent, or to whether the consent is subject to special conditions (other than conditions

precedent). Each of these subjects is separately addressed elsewhere in this Report.

3. Final Order

Recommended Language:

The order of the FCC granting its consent was [issued or released] on [date], and public notice of such consent was given on [date]. The time within which any party in interest other than the FCC may seek administrative or judicial reconsideration or review [has expired or expired on {date}], and no petition for such reconsideration or review was timely filed with the FCC or with the appropriate court. The time within which the FCC may review the consent on its own motion [has expired or expired on {date}], and the FCC has not undertaken such review.

Counsel is sometimes asked to render an opinion that the consent has become "final" or "no longer subject to administrative or judicial reconsideration or review." The Committee recommends against giving such opinions in light of cases such as *Sunrise Communications, Inc.*,(18) and *Letter to Richard M. Riehl*,(19) in which the Mass Media Bureau, on discovering procedural irregularities, reconsidered its prior action well after the period for reconsideration under Sections 1.106 and 1.117(20) had expired. The Court of Appeals for the District of Columbia Circuit also has held that the Commission retains jurisdiction to entertain an untimely petition for reconsideration when the late filing was due to a procedural violation on the part of the Commission, for example, failure to effectuate timely personal notice.(21) Although *Gardner* subsequently was limited to its facts,(22) and the Mass Media Bureau staff's actions cited above were not tested on appeal, the Committee believes that it is more appropriate to say that the normal periods for private parties or the FCC to take action to set aside the consent have expired without any such action being taken.(23)

The practical difficulties of ascertaining whether the Commission has granted review on its own motion or whether judicial review has been sought are considerable. The former action is so rare that there are no established procedures for the Commission to follow in such circumstances. Inquiry of the Commission's staff responsible for the action should constitute due diligence on that point.

Subject to venue requirements, judicial review of nonlicensing proceedings can be had in any federal circuit and the only name certain to appear in the caption is that of the Commission. Most Commission actions—in contexts in which opinions are given—are appeals under 47 U.S.C. § 402(b); however, jurisdiction is exclusively vested in the District of Columbia Circuit, making the diligence task somewhat easier. Ordinary diligence should, however, include inquiry of the general counsel's office of the FCC. Finally, the fact that most actions that will be the subject of opinion are taken by the staff on delegated authority means that judicial review will not lie. The Committee believes that, in such circumstances, no review of court dockets need be undertaken to see if judicial review has been sought plainly in violation of statute.

4. Sufficiency of Consent

Recommended Language:

Such consent constitutes all necessary consents, approvals, and authorizations required under the Communications Act for the [describe FCC aspect of the transaction to be consummated at the closing, for example, assignment of the FCC licenses to the borrower, transfer of control of the FCC licenses to the borrower, execution and delivery of the loan documents, funding of the loan].

This opinion is intended to advise the recipient that the FCC does not impose any consent obligations other than the consent to the assignment or transfer of control of the licenses listed on Exhibit A. Counsel should take care to avoid describing the transaction with language such as "sale of the shares" or "transfer of control of the company" which would cover all licenses, not just those listed. This opinion is appropriate in the context of a transaction that does in fact require FCC consent. For transactions in which no FCC consent is required, such as a loan, the opinion in Part II(B) below would be used instead of the opinions in this subsection.

Sometimes broader formulations are requested, such as that the consent is sufficient "for the performance by the Company of its obligations under the Agreement" (or even broader language). Such formulations embrace future events, such as in the event of default, and are not limited to events at the closing.(24) To the extent that the opinion recipient is not fully aware of the fact that this opinion, unlike the opinion in Part II(C), does not address transactions to be consummated after the closing date, it may be appropriate to add the following qualifier: "We call your attention to the fact that this opinion speaks only to the transactions that are being consummated on the closing date and does not address any transactions that may take place after the closing date."

Even where FCC consent is not required for the execution or delivery of a loan document, the FCC's rules require that certain loan documents be filed with the FCC. Therefore, the following qualifier may be included: "We call your attention to the fact that certain Loan Documents will need to be filed with the FCC within thirty days after their execution."

B. If No Consent Is Necessary:

Recommended Language:

No consent, approval, or authorization of, [or filing with], the FCC is necessary for the [describe transaction to be consummated at the closing (*e.g.*, sale of the shares to the borrower, execution and delivery of the loan documents, and funding of the loan)] [except as described in the agreement].

In many cases, such as most financing transactions, no FCC consent may be necessary prior to consummation of the transaction. Normally, FCC consent would be required prior to the exercise of certain of the lender's remedies, and the obligation to obtain such consent is typically set forth in the operative documents themselves. However, to the extent such documents are filed with the Commission, the Commission may, upon review, ask that provisions explicitly requiring FCC consent be included in the agreement if they had not previously been included.

Another context in which this opinion may be given is a transaction that does not require FCC consent at all. For example, the sale of a cable television system that does not use any CARS microwave or other FCC-licensed facilities may not require any FCC consent, but it would be reasonable for a purchaser or lender to ask for confirmation of this legal conclusion from seller's or borrower's counsel. In this situation, counsel is necessarily opining that the Company has no FCC licenses. Such an opinion requires counsel to exercise the same level of diligence as required for a sufficiency of licenses opinion.(25)

To the extent that the opinion recipient is not fully aware of the fact that this opinion, unlike the opinion described in Part II(C), does not address transactions to be consummated after the closing date, it may be appropriate to add the following qualifier: "We call your attention to the fact that this opinion speaks only to the transactions that are being consummated on the closing date and does not address any transactions that may take place after the closing date."

Even where FCC consent is not required for the execution or delivery of a loan document, the FCC's rules require that certain loan documents be filed with the FCC. Therefore, the following qualifier may be included: "We call your attention to the fact that certain Loan Documents will need to be filed with the FCC within thirty days after their execution."

In addition to the fact that this opinion does not address transactions to be consummated after the closing date, this opinion also does not address whether performance of the transactions to be consummated on the closing date violates the Communications Act or the Commission's rules. For example, no FCC consent may be required in connection with the grant of a security interest in an FCC license, but a question exists whether such an act complies with the Communications Act and the Commission's rules. Another example is the acquisition of a cable system not requiring FCC consent but which leads to a violation of the multiple ownership rules. These kinds of issues are addressed by the Transaction Does Not Violate opinion, discussed in Part II(C) below.

C. Transaction Does Not Violate

Recommended Language:

The execution and delivery of the agreement, and the performance by the Company of its obligations under the agreement, will not violate the Communications Act.

Whether or not consent is required for a transaction, the question may be presented whether the "execution and delivery" of the agreement, and the "performance" of the terms of the agreement, generally comply with the Communications Act.

Bear in mind that the term "Communications Act" has been defined in the foreword of this Report to include the rules and regulations of the FCC; the written orders, policies, and decisions of the FCC; and the judicial decisions interpreting the above.

1. Execution and Delivery

There are few restraints imposed by the Communications Act on execution and delivery of documents. There are, however, some potential issues to which counsel should be sensitive in giving such an opinion. As an illustration, if the covenants in a loan agreement are too broad, it is possible for the execution and delivery of the loan agreement, without more, to constitute a transfer of control of the licensee. Another example is the grant of a security interest in a license, which is also complete upon execution and delivery of a security agreement without further action, although there is some debate at present concerning the lawfulness of security interests in FCC licenses.

2. Performance

In rendering a performance opinion, a number of issues arise that are not unique to communications opinions: Which obligations and transactions are covered in an opinion and how is counsel to deal with the uncertainty of future events? These issues, which are also present in the context of corporate transactions generally, have been well addressed by the *ABA Accord.*

The *ABA Accord* recommends that the opinion giver avoid formulations such as "the transactions contemplated by the transaction documents."(26) "Contemplate" is an inherently subjective term, asking for a prediction of future events that encompasses a variety of circumstances, even those not expressly mandated by the agreements. For these reasons, Paragraph 16.3 of the *ABA Accord* suggests that the opinion letter identify with particularity the transactions or agreements covered.

To the extent that an opinion speaks of future events, such as those mentioned in the preceding paragraph, the opinion should be deemed to relate only to conduct required by the terms of the agreement or to consummate the specified transactions in accordance with the terms of the agreement, as suggested by Section 4(n) and Paragraph 16.6 of the *ABA Accord*. Those provisions state that the opinion giver may assume that no discretionary action will be taken by the Company that would result in a violation of law.

As set forth in Paragraph 4.6 of the *ABA Accord*, however, this assumption is not appropriate if it essentially embodies a specific issue with which the opinion deals directly. One cannot assume no violation of law if asked to give a "no violation of law" opinion. For example, if one is asked to give an opinion about the lawfulness of a loan agreement, the proceeds of which are to be used to acquire a station, it is not appropriate to assume that the client will first obtain FCC consent to the station acquisition. However, if the agreement explicitly provides that the proceeds may not be used to acquire the station until the FCC consent has been obtained, then no such assumption is necessary to give a clean opinion. Likewise, if one is asked to render an opinion about a transaction that includes an option issued to an

alien client, it is not appropriate to assume that the client will exercise the warrant only if such exercise is in compliance with law.

As a general and overarching principle, the opinion giver may not rely on information (including certificates or other documentation) or assumptions, otherwise appropriate in the circumstances, if the opinion giver has actual knowledge that the information or assumptions are false or the opinion giver has actual knowledge of facts that, under the circumstances, would make the reliance unreasonable.(27)

III.Absence of Litigation

A. Recommended Language:

Based upon a review of the public files of the FCC, appropriate files of this firm [identify with particularity any other information relied upon, such as an officer's certificate] and an inquiry of lawyers in this firm who have substantial responsibility for the Company's legal matters handled by this firm, we confirm that, except as disclosed at [exhibit attached to opinion or schedule to Transaction Document]:

Alternatives:

(1) there is no unsatisfied adverse FCC order, decree, or ruling outstanding against the Company, the Station, or any of the FCC licenses;

(2) there is no proceeding (including any rulemaking proceeding), complaint, or investigation against the Company or in respect of the Station or any of the FCC licenses pending or threatened before the FCC (including any pending judicial review of such an action by the FCC) except for proceedings affecting the [*e.g.*, radio, television, cable] industry generally, to which the Company is not a specific party;

(3) the Company is not a party to any complaint, action, or other proceeding at the FCC, including both complaints against other licensees or applicants and rule makings of general applicability;

(4) [the appropriate schedule to the transaction documents] includes all applications on behalf of the Station or with respect to the FCC licenses that are now pending before the FCC;

(5) the Company has not been the subject of any final adverse order, decree, or ruling of the FCC (including any notice of forfeiture which has been paid) since [specify date, such as the date of the grant of the last renewal application]; and

(6) no action, suit, proceeding, or investigation is pending or threatened, and no judgment, order, decree, or ruling has been entered, against the Company in any court or before or by any governmental authority (other than the FCC) that gives us reason to believe that any of the FCC licenses will be revoked or will not be renewed in the ordinary course.

As recognized at Paragraph 17.1 of the *ABA Accord*, a request for information regarding the existence of pending or threatened proceedings or outstanding judgments at the FCC is inherently factual and is not, strictly speaking, an opinion of law. Nevertheless, the Committee believes that it is generally appropriate to request such a confirmation from seller's or borrower's counsel because such counsel is likely to know such information or be able to obtain it more efficiently than counsel for the buyer or lender. The response is couched as a factual confirmation rather than a legal opinion because no legal issue or professional judgment is typically involved. The Committee nevertheless recognizes that there may be situations where this confirmation requires the exercise of legal judgment, for example, in determining whether a complaint remains pending at the FCC where the FCC has referred it to another agency.

The confirmation regarding legal proceedings requested of FCC counsel is broader in scope and requires more

investigation than the confirmation regarding legal proceedings set forth at Section 17 of the *ABA Accord*. Unlike responses to requests for confirmations regarding legal proceedings generally, the Committee believes it is appropriate to request counsel to review the public records of the FCC, as well as to rely on information provided by the client, in order to ascertain the existence of legal proceedings.(28) There are practical limitations on the ability to ensure a comprehensive review of the FCC's records, given the state of the FCC's own recordkeeping process and the fact that certain investigations and complaints may be confidential or otherwise not public. The appropriate scope of the opinion giver's own files is likely to vary depending upon such factors as the length of time the firm has represented the particular client and the number of matters not directly related to the FCC in which the firm represents the client. The Committee recommends that the opinion giver should describe in its opinion any limitation on review of its files.(29)

The scope of the "no litigation" opinion will depend upon the needs and value of the specific transaction. It is extremely unlikely that all six of the alternatives identified above would be appropriate in a single opinion, but any one or more of them may be appropriate in a given case. They are discussed below.

1. As to Opinion B(1):

The suggested language of Opinion B(1) uses the more generic terms "order," "decree," and "ruling" rather than terms more peculiar to FCC practice, such as "notice of apparent liability," "notice of forfeiture," "order to show cause," "revocation," and the like. The generic encompasses the specific.

2. As to Opinion B(2):

Rule makings to which the Company or the Station is a party are included within the scope of legal proceedings covered by this confirmation under Opinion B(2) in light of the fact that some FCC rule makings are in the nature of adjudicatory proceedings having particular applicability to an individual company or station.

3. As to Opinion B(3):

In addition, the suggested language of Opinion (B)(3) seeks confirmation that the Company or the Station is not a party to any rule making of general applicability or a complaint against another licensee or applicant. This confirmation will not always be appropriate, but may be useful in the context of certain transactions where the recipient of the opinion will inherit the Company's or the Station's party status. Furthermore, the opinion recipient should be aware of the Company's or the Station's participation in such proceedings, which may be indicative of potential problems for the Company or the Station.

4. As to Opinion B(4):

Counsel is also often asked to identify any pending applications that a Company has on file at the FCC. Unfortunately, as with determining the licenses held by the Company,(30) there is no practical way to search the FCC's records by company name. Thus, it is not possible for counsel to deliver this opinion with a great deal of certainty. Engineering staff, field personnel, or others may have filed applications without the knowledge of counsel or company management.

Unless specifically requested, counsel providing the opinion should not be expected to (1) predict the anticipated action on any application pending on behalf of the Company, (2) predict the effect of the pending application on the current operations of the facilities, or (3) uncover pending applications filed by other parties that may affect the Company's operation, for example, an application filed by another licensee for an upgrade in facilities that may preclude an improvement in the Company's facilities.

In the Committee's view, appropriate diligence for this opinion requires a review of counsel's own files and the available records, files, and databases at the FCC. Inquiry of the consulting or contract engineer and representatives of the Company is also required. Such inquiries should yield the necessary information on any pending applications. While it is possible that applications filed on behalf of the Company remain pending and are not revealed until after making these inquiries, the Committee is unaware of what other sources counsel can reasonably be expected to consult to determine this information.

5. As to Opinion B(5):

The suggested language in Opinion B(5) is intended to cover counsel's knowledge of non-FCC misconduct that the FCC might consider relevant to a licensee's qualifications. By including the suggested language, the Committee does not intend to suggest that the scope of the opinion giver's investigation should in any way be broadened beyond that described in the prefatory language, since to do so would be unduly burdensome and expensive. Nevertheless, this opinion may be particularly problematic for a large law firm with a number of specialized departments, whose lawyers may have represented the Company without the knowledge of the lawyers immediately responsible for the opinion. While the Committee recognizes that this opinion may create the expectation that a firm will ask all such lawyers whether they have knowledge of relevant litigationÄwhich may be an administratively difficult task in a large firmÄthe Committee does not believe that a different standard should apply to opinion givers based upon the size of their firms.

A proceeding will be deemed "threatened" only if the "threat" has been overtly made in a written communication. The Committee does not understand the terms "threatened" or "pending" to encompass circumstances where, because of the existence of prior adverse determinations (such as a recent history of forfeitures or an adverse determination in a collateral proceeding), it might reasonably be anticipated that future applications of the Company will be challenged. If prior satisfied judgments or adverse determinations are deemed relevant, the opinion recipient should make a specific request along the lines suggested in Opinion B(5). Further, the Committee believes that "threatened" litigation does not include a situation where the Company has engaged in a violation of law that may ultimately result in the initiation of an adjudicative proceeding: the circumstance described is at most an "unasserted claim" and not a pending proceeding and should be addressed, if at all, in the context of a compliance with law opinion.

The FCC has also stated that misconduct by a principal of a company may be relevant to the qualifications of the Company itself to be an FCC licensee. The suggested language, however, is confined to proceedings or judgments against the Company and does not specifically include litigation against the Company's principals. The Committee believes that the language should not be construed to cover counsel's knowledge of proceedings or judgments against a principal of the Company to the extent that the FCC may consider such principal's misconduct, or alleged misconduct, relevant to the qualifications of the Company itself to be an FCC licensee, in the absence of an explicit statement to the contrary. Furthermore, an opinion giver should not be under any obligation to include litigation against anyone other than the Company itself unless expressly requested to do so.

The Committee points out that even if an investigation or complaint is not public, counsel with actual knowledge of such investigation has a duty to disclose it unless instructed otherwise by the client, in which case, counsel should indicate that it has been so instructed by the client.(31)

The suggested language does not contain any materiality threshold, although in particular cases one may be appropriate. It is difficult, however, in FCC matters to assign a monetary value to pending or threatened proceedings. Therefore, counsel may want to define materiality by reference to the potential impact of the proceeding on the Company's FCC licenses or its ability to continue to operate its primary business (*e.g.*, a VHF television station in Washington, D.C.).

IV.Compliance with Law

Recommended Language:

[None].

The breadth of Communications Act regulation is such that it is inappropriate to give a general opinion to the effect that a licensee is operating in compliance with law. The elements of compliance include a host of factual matters, both technical and operational. As a general rule, a lawyer should not opine as to factual matters; the recipient should rely on the representations of the Company in the operative documents.

Most of the issues on which an opinion recipient legitimately desires comfort are covered by other opinions. Counsel can opine that the licenses are validly held (Opinion I(A)); that the licenses are sufficient to operate the station (Opinion I(D)); and that there are no pending proceedings regarding the license (Opinion III).

Moreover, to give a general opinion as to compliance with law requires an uncabined amount of diligence. For example, to ensure that a broadcast station had complied with the Commission's broadcast indecency regulations would require a review of transcripts of all of the station's programming during the current license term. Such diligence, even if possible, would be unreasonable in any transaction. In addition, it could mislead an opinion recipient, who might believe that the opinion giver is able to conduct, and has in fact conducted, the diligence necessary to know whether the company is in compliance with the Communications Act.

If, in a given transaction, particular features are of special importance, an opinion as to compliance with any specified rule may be appropriate. In such a case, the lawyer's diligence in rendering the opinion should be specifically negotiated. Even in the indecency example given above, if this issue were of particular importance to the opinion recipient, the parties could negotiate the scope of the opinion giver's review of the station's programming to enable the opinion giver to render a suitably limited opinion.

Finally, counsel is sometimes asked by opinion recipients who are sensitive to the factual nature of the compliance with law opinion to limit this opinion to counsel's best knowledge, or to render an opinion to the effect that counsel has not been advised of matters that constitute a violation of law. The Committee is of the view that such an opinion is still subject to the criticisms identified above. Counsel may have knowledge of two seemingly unrelated facts that, if viewed together, could constitute a violation of one of the Commission's rules, and yet, never having been consulted by the client on the issue, not have conscious awareness of a violation of law. Counsel may disclaim knowledge of facts but not of the law, so it does not suffice to ask counsel to opine that they have no knowledge, or even conscious awareness, of a violation of law.

For example, counsel may have been advised that a broadcast station has changed the location of its main studio to an address outside the city of license; counsel may also be aware that the station's transmitting facilities have been modified. Combined, these facts may lead to the conclusion that the main studio's location violates the Commission's rules. It is not uncommon for counsel to a broadcast station to be aware of two events like these amidst a host of disparate facts concerning the station and never have occasion to put the two together. If one were presented with the two facts side by side, it would perhaps be obvious that there was a violation of the rules, but many competent counsel would never have occasion to cull these two facts from their sea of knowledge about the station's affairs. To give such an opinion, even confined to knowledge, would be a trap for unwary counsel and would give the recipient an illusion of greater certainty than counsel is truly in a position to give. In the extreme case, the opinion recipient is ultimately provided with the assurance it desires: ethical obligations preclude a lawyer from participating in a fraud, so counsel cannot proceed if they have actual knowledge that the Company is in material violation of its representation that it is operating in compliance with the Communications Act.

Appendix A: Sample Form of Opinion Letter

[Date]

[Name of Company Receiving Opinion Letter]

[Address of Company]

Attention: **[Name of Recipient]**

Re: **[Identify the Transaction]**

Dear Sir or Madam:

We have acted as special communications counsel to **[Name of Company]**, a **[State of Incorporation]** corporation (the Company) and represented the Company before the Federal Communications Commission (the FCC) in connection with that certain **[Identify Name of Agreement]** dated **[Date]** (the Agreement) for **[Identify What the Agreement is For]** involving Station **[Call Sign]** (the Station). This opinion is being furnished to you at **[Name of Party]**'s request, pursuant to **[Section #]** of the Agreement. Capitalized terms not otherwise defined herein are defined as set forth in the Agreement.

This opinion is limited to matters specifically discussed herein relating to the Communications Act of 1934, as amended, the rules and regulations of the FCC, and the written orders, policies, and decisions of the FCC and the Court's interpretation of them (herein defined as the Communications Act), and we express no opinion as to any other laws, statutes, rules, or regulations. Our opinion does not address the effect, if any, of pending legislation or of proceedings before the FCC or the courts to which the Company is not a party.

For purposes of the opinion letter, for factual matters, we have relied upon **[List as Appropriate]** (i) an examination of records in the public reference rooms of the FCC available for inspection on **[Date]**; (ii) representations and warranties of the Company contained in the Agreement and **[Identify any Additional Documents, Including FCC Applications]**; and (iii) certificates provided to us by the Company in connection with this opinion. We have not made any independent review or investigation of factual or other matters for purposes of rendering this opinion. We have also assumed the accuracy, completeness and authenticity of the foregoing public information.

Based on and subject to the foregoing and such examinations of law and fact as we have deemed necessary or appropriate, our opinion is as follows:

[Specific Opinions Expressed Here]

Our opinions herein contained are subject to the following qualifications:

We have not independently verified the manner in which the Station is now being operated, have no expertise in that area, and, therefore, render no opinion with respect to technical matters. To the extent we have rendered an opinion as to the sufficiency of the FCC Licenses for the present operation of the Station, that opinion is based solely upon the representations and warranties made by the Company in the Agreement and pertinent statements and representations of officers and responsible representatives of the Company.

Certain future FCC consents and filings are clearly contemplated by the **[Identify Name of Agreement]**. Under the Communications Act, FCC approval will be required prior to the transfer of control of the Company or of assignment of any of the FCC Licenses, or the exercise of any voting rights or management authority over the Company, to the extent the same constitutes a transfer of control of the Company or assignment of any of the FCC Licenses.

To the extent that **[Identify Name(s) of Agreement(s)]** purports to grant or assign a security interest in the FCC Licenses, we express no opinion on the validity or enforceability of such a security interest. Furthermore, we advise you that the FCC and various federal courts have held that the attempted creation of a security interest in a license issued by the FCC is neither valid nor enforceable.

Under FCC regulations, certain contracts and agreements relating to ownership or control of licenses must be filed with the FCC within thirty (30) days after their execution. Pursuant to such regulations, copies of the Agreement and certain of the **[Identify Name(s) of Agreement(s)]** must be filed with the FCC after consummating the transaction.

This opinion is being furnished to you subject to the qualifications and limitations expressed herein and may be relied upon by you only with respect to the specific matters which are the subject hereof. This opinion has been prepared solely for your use in connection with the closing of the transactions contemplated under the Agreement, and should not be quoted in full or in part or otherwise referred to, or be filed with or furnished to any governmental agency or other person or entity without the prior written consent of **[Name of Law Firm Providing Opinion Letter]**. We assume no obligation to advise you of changes subsequent to the delivery of this opinion letter.

Very truly yours,

[Name of Law Firm]

By: _____

[Name of Attorney]

Appendix B: FCC Form 732

(1)This Report is published by the Federal Communications Bar Association (FCBA)

as an aid to its members and other communications law practitioners in drafting and negotiating opinion letters for transactions in FCC-regulated industries. Although the Executive Committee of the FCBA has approved publication of this Report, the views set forth in this Report do not constitute the position of the FCBA. Those using this Report should apply their own or their FCC counsel's expertise when evaluating the Report's conclusions and recommendations and applying them to their own factual situations. Neither the FCBA nor the Authors of this Report assume any liability to any user of this Report. The Committee would appreciate receiving comments that it may consider for any future revised editions.

(1)See generally Third Party Legal Opinion Report, 47 Bus. Law. 167 (1991)

[hereinafter *ABA Accord*].

(2)Freedom of Information Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250

(codified as amended at 5 U.S.C. § 552 (1994)).

(3)See Communications Act of 1934, ch. 652, § 214, 48 Stat. 1064 (codified as

amended in scattered sections of 47 U.S.C. (1988 & Supp. IV 1992)).

(4)See discussion *infra* Part I(A).

(5)See ABA Accord, *supra* note 1, § 4.

(6)Id. § 5.

(7)See Model Rules of Professional Conduct Rule 2.3 (1995).

(8)Which records are relevant will depend upon the service involved and the factors

identified in Option 2 *infra*.

(9)To the extent that the recipient has a question about which licenses are necessary

to the operation of a particular facility, see discussion *infra* Part I(D).

(10)See discussion *infra* accompanying Part III concerning pending or threatened

proceedings.

(11)See discussion of finality *infra* accompanying Part II(A)(3).

(12)47 U.S.C. § 310(b) (1994).

(13)47 C.F.R. § 1.102 (1994).

(14)For general guidance on such questionnaires, see *ABA Accord*, *supra* note 1, § 3.

(15)See infra Appendix B: FCC Form 732.

(16)For a discussion of the significance of reliance on other counsel's opinion, see *ABA*

Accord, *supra* note 1, § 8.

(17)47 C.F.R. § 1.102 (1994).

(18)Letter from Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau,

to Sunrise Communications, Inc. and Chronicle Broadcasting of Omaha (Jan. 16, 1987) (contact the Mass Media Bureau of the FCC for a copy of this letter).

(19)Letter from Larry D. Eads, Chief, Audio Services Division, to Richard M. Riehl

(June 21, 1985) (contact the Mass Media Bureau of the FCC for a copy of this letter).

(20)See 47 C.F.R §§ 1.106, 1.117 (1994).

(21)Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976).

(22)See Reuters, Ltd. v. FCC, 781 F.2d 946 (D.C. Cir. 1986).

(23)If counsel has knowledge that a petition has been filed, whether timely or not, that

fact should be noted in the opinion.

(24)For a discussion of transactions occurring after the closing, see *infra* Part II(C).

(25)See supra Part I(D).

(26)See ABA Accord, *supra* note 1, ¶ 16.3.

(27)Id. § 5.

(28)Id. ¶ 3.2 and § 5.

(29)For an alternative approach, see *id.* §§ 2, 3, 5, 6-A, 6-B, and ¶ 6.4.

(30)See supra Part I(A).

(31)Cf. ABA Accord, *supra* note 1, ¶ 4.6 and § 5.