

ORIGINAL

ORIGINAL
FILE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of	)	MM DOCKET No. 92-183
)	
WESTERN INSPIRATIONAL BROADCASTERS, INC.	)	File No. BPED-910923MF
)	
BROAD SPECTRUM COMMUNICATIONS, INC.	)	File No. BPH-910925ME
)	
PHOENIX BROADCASTING, INC.	)	File No. BPH-910926ME
)	
NINETY-TWO SEVEN, LTD.	)	File No. BPH-910926MF
)	
For Construction Permit for New FM Broadcast Station on Channel 224A at Chico, California)	

RECEIVED

OCT 16 1992

TO: Honorable Edward J. Kuhlmann
Administrative Law Judge

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO INFORMAL OBJECTION

Phoenix Broadcasting, Inc. (Phoenix), by its attorney, hereby respectfully submits its Opposition to the "Informal Objection" filed with the Commission on October 9, 1992 by Michael G. Barnes (Barnes). Barnes' pleading fails to state any basis why the Phoenix application, as amended, should not be granted. Therefore, the "Informal Objection" must be dismissed or denied. In support whereof, the following is shown:

Preliminary Statement

1. Barnes alleges that Gary Katz, the President and 77 percent stockholder of Phoenix, somehow lacks the character qualifications to be a Commission licensee because: (1)"he personally approved the broadcast of a bingo lottery on Station KALF(FM) and KBLF(AM), Red Bluff, CA"; and (2)"a

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member of the general public asked to view [Phoenix's Public File(s)], was not allowed to see it, and was verbally questioned and assaulted by Mr. Katz".

2. Although Barnes affirmed "under penalty of perjury" that the facts stated in his "Informal Objection" were "true and correct", it is readily apparent from the face of his pleading that Barnes had no personal knowledge, other than hearsay, of the matters alleged by him. Barnes' pleading therefore falls well short of the standard for petitions to deny, motions to intervene and motions to enlarge issues stated in Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1), and Sections 1.223(b) and 1.229(d) of the Commission's Rules; to wit, that such pleadings "shall be supported by affidavits of a person or persons having personal knowledge thereof".

Lottery Matter

3. It is to be noted that the lottery matter raised by Barnes was resolved in the Morgan Hill, California FM proceeding, MM Docket No. 88-205. In that case, a "Petition to Enlarge Issues" was filed against applicant LOCAL Morgan Hill Radio Associates (LOCAL), which was one-third owned by Mrs. Jerrie Lynn Rindahl-Katz (in 1988 she was known as Jerrie Lynn Rindahl-Caulfield, her name under a prior marriage). Mrs. Rindahl-Katz is a 20 percent shareholder in Phoenix. The lottery matter involved the broadcast by

stations KALF(FM) and KBLF(AM), Red Bluff, California of spots for bingo games operated by a local post of the Veterans of Foreign Wars (VFW), a non-profit organization in the year 1987. Gary Katz was General Partner of the licensee of KALF/KBLF and general manager of those stations; Jerrie Lynn Rindahl-Katz was sales manager of those stations.

4. Affidavits appended to an "Opposition to Petition to Enlarge Issues" filed by LOCAL with the Commission on June 28, 1988 by Jerrie Lynn Rindahl-Caulfield and by Gary Katz are attached hereto as Exhibits A and B. Those affidavits show that Mr. Katz determined that the spots were not illegal after a consultation with District Attorney James Lang. Mr. Katz wrote a memorandum about his conversation with Mr. Lang and placed it in the KALF/KBLF public file.

5. Based on those affidavits, ALJ John M. Frysiak denied the "Petition to Enlarge Issues" by Memorandum Opinion and Order, FCC 88M-2476, released August 1, 1988 (Exhibit C). It is significant that this matter was raised before a Commission ALJ, and in a proceeding which involved counsel for the Chief, Mass Media Bureau. It is clear that, were there any substance to the charges made by LOCAL's opponent in the Morgan Hill case, that the matter would have been referred to the appropriate personnel in the Mass Media Bureau's Enforcement Division.

6. Section 503(b)(6)(A) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b)(6)(A), imposes a three year statute of limitations on the issuance of forfeiture penalties; that is, the violation of Commission rules which incurs a monetary forfeiture must have taken place within three years of the date of issuance of the required notice of forfeiture. Since the matters raised by Barnes took place in 1987, any contemplated forfeiture proceeding would be barred by the foregoing statute of limitations.

7. Moreover, Gary Katz has been found to possess the basic qualifications to be a Commission licensee in three applications which were filed subsequent to June 10, 1987:

- a. FCC Form 314 assignment of license application for KALF/KBLF from Wireless Associates (Gary Katz, General Partner), to McNulty Broadcasting Corp., File Nos. BAL-870902EA and BALH-870902EB, granted October 16, 1987.
- b. FCC Form 303-S application by Phoenix Broadcasting, Inc. for renewal of license of KCEZ(FM), Corning, California, File No. BRH-900718YG, granted April 16, 1991.
- c. FCC Form 314 application for assignment of license of KKCX(FM), Colusa, California to Phoenix Broadcasting, Inc., File No. BALH-911031GY, granted December 30, 1991.

8. Furthermore, Barnes had until March 2, 1992 to file a timely "Petition to Deny" against the above-captioned Phoenix application. He failed to do so. If Barnes were a "concerned citizen" as he claims to be in his instant "Informal Objection", where was he when the above

applications were pending at the Commission? Where was he on March 2, 1992? ALJ Frysiak's ruling in Morgan Hill, the Commission's grant of the above-cited applications involving Mr. Katz, the statute of limitations in 47 U.S.C. §503(b)(6) (A), Barnes utter lack of timeliness and the equitable doctrine of "laches" require that the presiding Judge (1)reject Barnes' "Informal Objection" and (2)take favorable action on the pending settlement agreement in this case at the earliest possible time.

Public File Matter

9. Without any probative evidence whatsoever, or any statement of a person with personal knowledge, Barnes seeks to thwart the approval of the settlement agreement in this case by alleging that a female who sought to review Phoenix's public file was "verbally questioned and assaulted by Mr. Katz". There is attached hereto as Exhibit D a "Declaration" of Mr. Katz which recounts the public file inspection, and indicates that Mr. Katz in no way "assaulted" the female involved, but rather provided full cooperation, and went so far as to make copies of certain materials in the public file without charge (under Section 73.3526(f) of the Rules, he could have charged for the copies).

10. The standard for hearing issues is whether the licensee sought to harass or intimidate a person or persons seeking to inspect the public file. Safe Broadcasting Corp.,

6 FCC Rcd 6548, 6550 (¶9) (Rev. Bd., 1991) and cases cited therein. Barnes claims that Mr. Katz "assaulted" the person who came to review the Phoenix public file. To be sure, this is a serious charge. Restatement of Torts 2d, §21, and 6 Am. Jur. 2d, Assault and Battery, §110, provides the following definition of "assault":

A person is subject to liability to another for assault if he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and the other is thereby put in such imminent apprehension. An action which is not done with such intention does not make the person liable to the other for an apprehension caused thereby, even though the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

6 Am. Jur. 2d, Assault and Battery, §3, notes that assault is

frequently defined as an intentional attempt by a person, by force or violence, to do an injury to the person of another, and as any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with a present ability, to commit a battery.

11. Thus, Barnes speculates that Mr. Katz sought to create in the person inspecting the public file a fear that Mr. Katz meant to do her bodily harm. Barnes provides no proof to support his fabulous allegation. Simply stated, Barnes' charge is wild, reckless and a libel against Mr. Katz. The presiding Judge must reject out of hand Barnes' "Informal Objection".

Conclusion

WHEREFORE, Phoenix Broadcasting, Inc. urges that the "Informal Objection" filed by Michael G. Barnes BE DISMISSED OR DENIED.

Respectfully submitted,

PHOENIX BROADCASTING, INC.

By 
Dennis J. Kelly
Its Attorney

CORDON AND KELLY
Post Office Box 6648
Annapolis, MD 21401

October 16, 1992

EXHIBIT A

County of Butte)
)
State of California)

AFFIDAVIT

I, Jerrie Lynn Rindahl-Caulfield, being duly sworn,
do hereby depose and state as follows:

1. I was employed as Sales Manager of KBLF and
KALF-FM, Red Bluff, California, from 1984 through
October, 1987.

2. I did not approve the sale of the political
advertising spots referred to by Laura Herron in her
Declaration of June 10, 1988. Only Gary Katz, the
General Manager of the Stations, had the authority to
sell political advertising spots. I did not have such
authority.

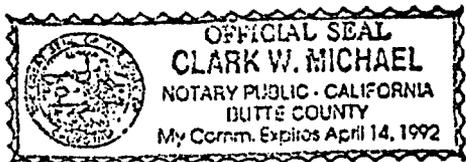
3. I told Laura Herron, on or about the first two
weeks of November 1987, when she and her family acquired
KBLF-AM and KALF-FM, that as Sales Manager, I was not
authorized to handle political advertising matters by the
previous ownership. I did not approve the sale of any
political commercials.

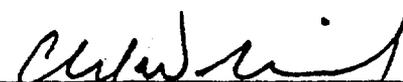
4. I did not approve the sale of the
advertisements for the bingo games. I brought the
matter to the attention of Mr. Katz, because I was
concerned that the proposed script was not legal. Mr.
Katz took charge of the matter, and he authorized the
broadcasts.

5. I certified on June 18, 1987, the application of LOCAL Morgan Hill Radio Associates for a construction permit for a new FM broadcast station at Morgan Hill, California. At that time I had not seen the final engineering report of Charles I. Gallagher, P. E. I did not know and was not told by anyone that I should wait to review Mr. Gallagher's engineering before certifying the application. I assumed that since Mr. Gallagher was a Registered Professional Engineer whose business involved preparing the technical portions of such applications that I did not have to review the material. I have since reviewed Mr. Gallagher's work, and it is true, complete and correct to the best of my knowledge and belief and was made in good faith.


Jerrie Lynn Rindahl-Caulfield

Sworn to and subscribed to before me this _____ day of
June, 1988.




Notary Public

My Commission expires: APRIL 14th, 1992

EXHIBIT B

County of Butte)
)
State of California)

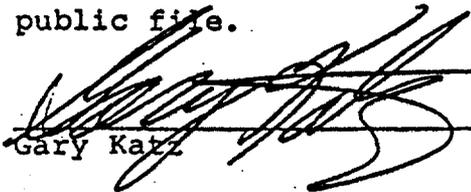
AFFIDAVIT

I, Gary Katz, being duly sworn, do hereby depose and state as follows:

1. I was the Managing General Partner of Wireless Associates, the licensee of KBLF-AM and KALF-FM, Red Bluff, California, from December 1, 1981 through October 31, 1987. I employed Jerrie Lynn Rindahl-Caulfield as the Sales Manager of these stations from 1984 through 1987.

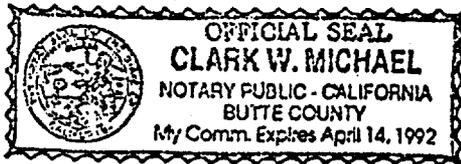
2. Shortly after Wireless Associates acquired these stations, I was the General Manager of the stations. I handled all political advertising matters myself. I have always felt that it is best to have one person handle political advertising to maintain fairness, consistency and compliance with the law. No employee, including Ms. Rindahl-Caulfield, was authorized to sell time to political candidates. Thus, Laura Herron's declaration that Ms. Rindahl-Caulfield, approved the sale of the political advertising spots in question is incorrect. Ms. Rindahl-Caulfield never had the authority to approve any political accounts, and she never did approve any of those accounts. All of the candidates and their representatives dealt directly with me.

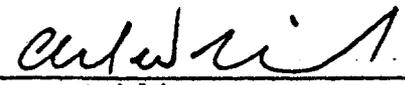
3. As to the advertisements for the bingo games, Ms. Rindahl-Caulfield brought this matter to my attention because she was concerned that the script of the proposed spot provided to the salesperson was not legal. I took charge of the matter and contacted the District Attorney to determine whether or not the stations could air these spots. As a result of my conversation with him, I concluded that the stations could air the spots, and I alone authorized the broadcasts. I prepared the attached memo on the matter which was inserted in the public file.



Gary Katz

Sworn to and subscribed to before me this _____ day of June, 1988.





Notary Public

My Commission expires: APRIL 14th, 1992

MEMO

TO: Public File

FROM: Gary Katz 

RE: VFW Bingo

June 10, 1987

As per a conversation today with District Attorney James Lang we will be airing commercials for this account. According to Lang the state licenses these non-profit organizations for their bingo games and considers these games to involve skill. As a result of this conversation we have determined that while "prize" and "consideration" do exist at least as far as the local authorities are concerned "chance" does not exist.

EXHIBIT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 88M-2476

In re Applications of	)	MM Docket No. 88-205	
	)		5074
LOCAL MORGAN HILL RADIO ASSOCIATES	)	File No. BPH-870625ML	
)		
MORGAN HILL FM LIMITED PARTNERSHIP	)	File No. BPH-870629MX	
)		
ETHNIC RADIO OF LOS BANOS, INC.	)	File No. BPH-870629MZ	
)		
MORGAN HILL BROADCASTING, A CALIFORNIA LIMITED PARTNERSHIP	)	File No. BPH-870629NB	
)		
TORO BROADCASTING GENERAL PARTNERSHIP	)	File No. BPH-870629ND	
)		
SOUTH VALLEY BROADCASTING, a California Limited Partnership	)	File No. BPH-870629NH	
)		
LAURA W. HERRON and GREGORY S. GENETTI d/b/a HERRON & GENETTI	)	File No. BPH-870629NK	
)		
PETER MIEULI	)	File No. BPH-870629NN	
)		
For Construction Permit for a New Television Station on Channel 241A in Morgan Hill, California)		

MEMORANDUM OPINION AND ORDER

Issued: July 28, 1988; Released: August 1, 1988

1. Under consideration are the following: Petition to Enlarge Issues, filed June 13, 1988, by Laura W. Herron and Gregory S. Genetti d/b/a Herron and Genetti ("Herron and Genetti"); Comments in Support of Petition to Enlarge Issues, filed June 20, 1988, by Morgan Hill Broadcasting ("Morgan Hill"); Opposition, filed June 28, 1988, by Local Morgan Hill Radio Associates ("Local"); and Reply to Opposition, filed July 18, 1988, by Herron and Genetti.

2. Herron & Genetti ask for an enlargement of issues against Local on various grounds, namely broadcast of lottery information, illegal air time charges for political candidates and certification of the application. The alleged lottery broadcasts and illegal advertising charges to political candidates occurred while Jerrie Caulfield was employed at stations KALF-FM/KBLF-AM, Red Bluff, California, as Sales Manager.

3. In opposition Local states that its alleged advertisements for bingo games were solely authorized by Mr. Gary Katz, the managing general partners of the license and the general manager of the stations at the time.

1 In its Comments in Support of the Petition to Enlarge Issues, Morgan Hill made reference to a civil lawsuit filed against Jerrie Caulfield. The information is not relevant to the allegations made in the Petition. To the extent that Morgan Hill seeks to add an issue, it is noted that affirmative relief may not be sought in responsive pleadings, but must be sought in original pleadings.

Mr. Katz avers that it was on the initiative of Ms. Caulfield that an inquiry was undertaken to determine the propriety of the spots. In its reply, Herron and Genetti refer to an authorization of bingo advertising signed by Ms. Caulfield and dated August 6, 1987. But this was after Mr. Katz authorized the airing of the bingo advertising and after he consulted the local District Attorney.

4. Similarly, it appears that Mr. Katz also solely authorized the political spots. Mr. Katz avers that no employee, including Ms. Caulfield was authorized to sell time to political candidates. Additionally, Local points out that on the date submitted in support of the motion, one cannot determine the "class," "amount of time" and "period" of the spots so as to determine the lowest unit rate. Local argues that it is basic political broadcasting law, Milam and Lansman, 4 RR 2d 463, 466 (Rev. Bd. 1964), that the lowest unit rate is not necessarily the lowest rate charged by a station.

5. In light of the foregoing, the requested lottery and illegal rate issues will be denied.

6. Ms. Caulfield admits that she did not have the final engineering report before her when she certified the application. She states that she believed it was unnecessary because the report was prepared by a registered professional engineer and that she was not advised that it was necessary to certify as to engineering report as well. Ms. Caulfield denies any intent to deceive and attests in an attached affidavit as to the report's completeness and accuracy. The requested certification issue is not warranted. Misrepresentation and lack of candor issues require evidence of intent to deceive. (Scott and Davis Enterprises, Inc., 50 RR 2d 1251, 1258 (Rev. Bd. 1982); Riverside Broadcasting Company, Inc., FCC 86-236 (released May 14, 1986). Here it is evident that Ms. Caulfield was mistaken about the requirement of certification. There is no evidence of any intent to deceive.

Accordingly, IT IS ORDERED that the Petition to Enlarge Issues, filed June 13, 1988, by Laura W. Herron and Gregory S. Genetti d/b/a Herron and Genetti IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

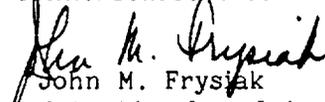

John M. Frystak
Administrative Law Judge

EXHIBIT D

DECLARATION

We, Gary Katz and Jerrie Lynn Rindahl-Katz, hereby state and declare as follows:

1. We are officers, directors and stockholders in Phoenix Broadcasting, Inc. (Phoenix), an applicant for a construction permit for a new FM Broadcast Station at Chico, California.

2. On Friday September 18, 1992, a woman came into Phoenix's corporate headquarters, 555 East Lindo Avenue, Chico, California. She asked an employee sitting at the front desk if she could obtain some information relative to Phoenix's KCEZ (FM) from its public file. That employee went to get Jerrie Lynn Rindahl-Katz, and Jerrie asked the visitor if she could help her. The visitor identified herself as Hilary Fassett and said that she wanted a copy of KCEZ's license and the first page of KCEZ's ownership report. Ms. Fassett did not ask to see Phoenix's public file for the Chico FM application, which is maintained at 555 East Lindo Avenue.

3. Although KCEZ's public file is maintained at the KCEZ main studio in Corning, California (KCEZ's community of license), we keep copies of most of the important items contained in the public file in our Chico office. Thus, Jerrie went to obtain the information sought by Ms. Fassett and make photocopies for her. While Jerrie was doing this, Gary Katz entered the front door, having returned from a meeting of the Lassen Volcanic National Park Foundation Board of Directors. Ms. Fassett was alone in our front lobby at this point; as Gary entered, he asked her if he could help her. Ms. Fassett told Gary that she had asked Jerrie for copies of the KCEZ license and the first page of KCEZ's ownership report. Gary went into the back of Phoenix's headquarters where Jerrie was at the copy machine making copies for Ms. Fassett. Gary then went back to talk to Ms. Fassett; he informed her that the Chico office was not the KCEZ main studio, which was located in Corning, and that the public file was located at the Corning studio; however the information that she requested was available in Chico, and that she would be provided with the information. Gary also told Ms. Fassett that the license itself and the first page of the ownership report do not provide much information about KCEZ, and he inquired if Ms. Fassett had something more specific that she wanted to find out so that he could help her. At this point, Ms. Fassett got defensive, and admitted that she did not want the information for herself but that it was for someone else whom she did not want to identify; it was this third person that told Ms. Fassett to get copies of the two items described above. Gary pointed out to Ms. Fassett that it was very difficult to help her if she would not tell us what she wanted; and that, if she would tell us what she wanted, we would gladly provide the information. By this point,

she was becoming more defensive and agitated. Jerrie had come back to the lobby with the photocopies, and she explained to Ms. Fassett that we were not trying to be obstructive, but instead were honestly trying to help her and that we were frustrated that she would not, or could not, assist us to help get her what she wanted. Ms. Fassett then said, "maybe I should come back later." Jerrie then gave her the photocopies of the KCEZ license and the first page of the ownership report, at no charge to her. Before Ms. Fassett left, we told her that when she figured out what she wanted, she should call us or go to the Corning main studio, and we would be happy to try to provide the information for her. She then left. We have never heard from her again.

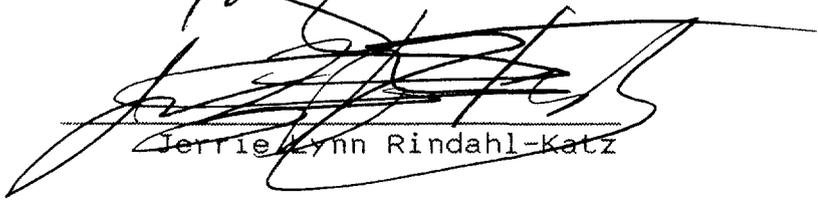
4. This is to affirm that we did nothing to harass or intimidate Ms. Fassett during her visit to Phoenix's headquarters; rather, we did everything in our power to try to help her, and we treated her courteously. Indeed, Ms. Fassett left the business with everything she said she came for. Moreover, we deny that we did anything that could possibly be construed as "assaulting" Ms. Fassett. We never threatened her in any way, nor did we engage in any conduct that placed her in apprehension or fear of bodily harm. Were Ms. Fassett, or any other member of the public, to come back to Phoenix's headquarters, or the KCEZ or KKCX main studios, such a visitor would be treated courteously and professionally, and would be entitled without reservation to a full review of station public file and license information, as is required by the Commission's Rules.

5. All statements made herein are true and correct and are made under penalty of perjury.

DATED this 15th day of October, 1992



Gary Katz



Jerrie Lynn Rindahl-Katz

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Opposition to Informal Objection" were served by first-class United States mail, postage prepaid, on this 16th day of October, 1992, upon the following:

Honorable Edward J. Kuhlmann (by hand)
Administrative Law Judge
Federal Communications Commission
Washington, DC 20554

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Hearing Branch, Mass Media Bureau
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Washington, DC 20554

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Dennis J. Kelly