

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In re Applications of	)	MM DOCKET NO. 93-75
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	File No. BRCT-911001LY
	)	
For Renewal of License of	)	
Station WHFT(TV) on Channel 45,	)	
Miami, Florida	)	
	)	
and	)	
	)	
GLENDALE BROADCASTING COMPANY	)	File No. BPCT-911227KE
	)	
For a Construction Permit for a	)	
New Commercial TV Station to	)	
operate on Channel 45, Miami,	)	
Florida	)	
	)	
To: Honorable Joseph Chachkin		
Administrative Law Judge		

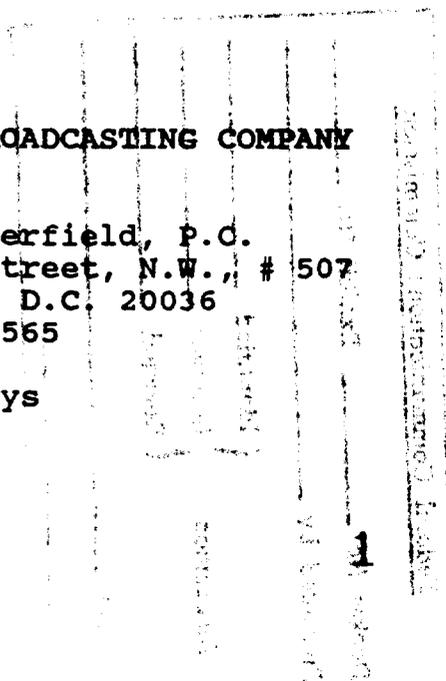
OPPOSITION TO CONTINGENT MOTION TO ENLARGE ISSUES  
AGAINST GLENDALE BROADCASTING COMPANY

GLENDALE BROADCASTING COMPANY

Cohen and Berfield, P.C.  
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(202) 466-8565

Its Attorneys

Date: June 7, 1993



Federal Communications Commission

Docket No. 93-75 Exhibit No. 268

Presented by TBF

Disposition { Identified 121  
Received \_\_\_\_\_  
Rejected \_\_\_\_\_

Reporter BARBARA LORD  
Date 1/21/94

W. (L) Brown 1-27-94

explained the intended use of the sites (low-power television), and both site representatives provided reasonable assurance letters despite any questions they had.<sup>6</sup> Raystay clearly acted in good faith.

TBF's citation of Rem Malloy Broadcasting, 6 FCC Rcd 5843, 5845-46, 70 RR 2d 9, 13-14 (Rev. Bd. 1991) is inapposite. The Board's basis for specifying a misrepresentation issue in that case is unclear. In any event, the site owner did not give the required reasonable assurance; he specifically told the applicant's principal only "that he would consider the possibility of placing a small antenna on the building..." Messrs. Rick and March, on the other hand, did more than "consider the possibility" - they signed reasonable assurance letters. Moreover, the applicant in Rem Malloy was proposing a 258 foot structure, which was far larger than the structures proposed here and clearly more than the "small antenna" that the owner possibly agreed to.

#### B. The Extension Applications

TBF also attacks certain identical statements made by Raystay in applications filed to extend the Lancaster and Lebanon construction permits. With respect to the Lancaster applications, TBF alleges that Raystay determined it could not use the Lancaster site. TBF Motion, P. 38. With respect to

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<sup>6</sup> TBF's statement that Mr. Rick "refused to sign a letter of intent" (TBF Motion, P. 37) is highly misleading. Mr. Rick prepared and signed a letter of intent, although it was not the letter Mr. Daly originally offered him.

all of the applications, TBF challenges the statements that Raystay had entered into lease negotiations with the site owners and that the sites had been visited to ascertain what work would have to be done at the site. TBF Motion, Pp. 39-40, 42-43. None of TBF's arguments can withstand scrutiny.

The attached declaration of David A. Gardner (Attachment 9 to this opposition) demonstrates that all of the challenged statement were correct. Mr. Gardner explains that in the latter part of 1991, he was involved in negotiations with several parties who were interested in purchasing the Lancaster and Lebanon LPTV construction permits (including Trinity). In the early fall of 1991, one of the potential purchasers asked David Gardner to call the owners to ascertain that the sites were still available. Mr. Gardner called both Ready Mixed Concrete Company and the Quality Inn, who confirmed that they were still willing to negotiate with Raystay. Mr. Gardner "generally discussed possible lease terms with both individuals." Attachment 9, P. 1.

A contract engineer hired by the potential buyer then visited both the Lancaster and Lebanon sites. The engineer was impressed with the Lebanon site, but was concerned about dust at the Lancaster site. Mr. Gardner was not told anything which would have led him to conclude that the site was unsuitable. If anybody told Mr. Rick that the site was unsuitable, it was the engineer for the potential buyer, not Mr. Gardner. Attachment 9, P. 2. Clearly, TBF's claim that

Raystay had determined that the site was unsuitable is based upon the incorrect premise that somebody from Raystay had told Mr. Rick that the site was unsuitable. As Mr. Gardner's declaration establishes, it was not Raystay who formed that opinion.

With respect to the statement that "[Raystay] has entered into lease negotiations with representatives of the antenna site specified in the applications", that statement referred to Mr. Gardner's 1991 phone conversations with the site representatives, where lease terms were generally discussed. Attachment 9, P. 2. The reference to visitations of the sites refers to the engineer's visit to both the Lancaster and Lebanon sites, as well as David Gardner's viewing of the sites. Attachment 9, Pp. 2-3. Mr. Gardner's declaration establishes that the statements were true.

Any conflicts between the declarations of Mr. Gardner and Mr. Rick or Mr. March do not require the specification of issues. In determining whether a substantial and material question of fact exists that requires a hearing, the Commission shall consider the entire record and weigh the petitioners's evidence against the facts offered in rebuttal. Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561, 65 RR 2d 538, 541-542 (D.C. Cir. 1988). Here, when the Presiding Judge weighs the entire evidence, David Gardner's account must be credited. It is totally unnecessary to question the honesty of Mr. March or Mr. Rick to reach that result. Mr.

March's recall of events is quite uncertain. He could not remember whether he was called or visited by Mr. Daly in 1989, and he completely forgot that he signed a letter of intent. It is not surprising that he would forget a subsequent conversation with David Gardner<sup>7</sup> or the engineer's visit, especially since no lease was ever consummated. Similarly, Mr. Rick was unclear about whose engineer visited the site in 1991, and his recollection appears to be largely based upon the documents he had in his possession.

When the entire record is considered as a whole, TBF has clearly failed to demonstrate the existence of a substantial and material question of fact as to whether Raystay acted with an intent to deceive the Commission. In this case, the relevant inquiry is whether George Gardner, not anybody else connected with Raystay, acted with an intent to deceive the Commission. TBF was required to show that George Gardner knew or had a strong reason to know that the statements in the extension applications were incorrect when he signed the applications. It has wholly failed to make such a showing.

#### VII. THE REHABILITATION SHOWING

TBF argues that the statements made by George Gardner in his rehabilitation showings "could hardly have been made in good faith" in light of the allegations made by TBF. TBF

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<sup>7</sup> It is possible, of course, that David Gardner spoke with representatives of the site owners other than Mr. March or Mr. Rick. Indeed, Mr. March is careful to state that there were no lease negotiations "[t]o the best of my knowledge." TBF Motion, Attachment 20, P. 4.