

construction permits and TV40 for a package price of \$400,000. The letter was prepared by David Gardner. Sandifer instructed David Gardner on the terms to include in the correspondence to TBN. TBF Ex. 230; Tr. 4636-37. TBN counteroffered with a price of \$150,000 for TV40 and \$5,000 for each of the five construction permits. TBF Ex. 231; Tr. 4642. Sandifer brought this counteroffer to George Gardner's attention. Tr. 5014.

227. Sometime between October 30, 1991, and November 7, 1991, David Gardner requested Cohen & Berfield to determine the maximum amount of money to which Raystay would legitimately be entitled under the Commission's rules upon the assignment of the bare construction permits. David Gardner recalls telling Morton Berfield ("Berfield"), a partner in the law firm of Cohen & Berfield, that the information was needed in contemplation of selling Raystay's LPTV authorizations. By letter dated November 7, 1991, Berfield provided the information on Raystay's reimbursable expenses to David Gardner. TBF Ex. 232; Tr. 4645.

228. On November 11, 1991, TBN prepared and sent to David Gardner an Asset Purchase Agreement for each of the five LPTV construction permits.³³ TBF Ex. 233, 234. David Gardner carefully reviewed the Asset Purchase Agreements. He marked up the agreements with suggested revisions. He anticipated that if the agreements were signed, they would be executed in December 1991. Tr. 4647-48, 4651-55. TBN also prepared and sent

³³ According to David Gardner, TBN did not prepare and send to Raystay an asset purchase agreement for TV40 because Raystay had communicated to TBN a rejection of its \$150,000 counteroffer for the existing station. Tr. 4648-49.

to Raystay applications on FCC Form 345 for consent to the assignment of the construction permits. David Gardner reviewed the applications as well. Tr. 4667-69.

229. In early December 1991, George Gardner informed Sandifer and David Gardner by interoffice memo that all talks about selling the construction permits and existing license to TBN were to be discontinued. The memo further stated, however, that it remained "OK to transfer to anyone else you may wish to work with." George Gardner claims that his latter instruction referred only to selling TV40, not the bare construction permits. TBF Ex. 238; Tr. 4671-4672, 5230. All further talks with TBN were in fact discontinued. Tr. 5015. George Gardner halted all negotiations with TBN because he had decided to file an application which he knew would be mutually exclusive with the TBN-related application for renewal of license of Station WHFT(TV), Miami, Florida. Tr. 5226.

230. During the course of its negotiations with TBN, Raystay had simultaneously been negotiating to sell TV40 and the LPTV construction permits to an individual by the name of Robert Shaffner ("Shaffner"). In October 1991, Sandifer and George Gardner had discussions with Shaffner during which Shaffner indicated that he would or might be willing to pay Raystay approximately \$300,000 for TV40. Tr. 5009-12. Sandifer sent a memorandum to Shaffner about the LPTV facilities on October 22, 1991. TBF Ex. 239; Tr. 5025. Raystay's talks with Shaffner never produced any agreement for the sale of the construction permits or TV40. Tr. 5027-28, 5234-35.

231. During this period, Raystay was also simultaneously negotiating to sell TV40 and the LPTV construction permits to yet another individual, Dennis Grolman ("Grolman"), President of Grosat Communications, Inc. ("Grosat"). Grolman ultimately focused his attention on buying the Red Lion construction permit from Raystay. On January 13, 1992, the parties filed with the Commission an application on FCC Form 345 for consent to the assignment of the Red Lion construction permit from Raystay to Grosat. The application was subsequently granted, and, in March 1992, the sale of the Red Lion authorization to Grolman's company was consummated. TBF Exs. 235, 240, 241; Tr. 4656-57, 5020-22.

232. While Raystay was engaging in efforts to sell TV40 and the LPTV construction permits in the fourth quarter of 1991, the company was also in the process of preparing and adopting a budget for the new fiscal year beginning on November 1, 1991. The budget that George Gardner ultimately approved did not provide for the allocation of any funds for the construction of the Lancaster or Lebanon stations. In fact, at *no time* during which Raystay held the LPTV construction permits for Lancaster and Lebanon did the company ever allocate funds in its budgets for the construction of the stations. Tr. 5237-38, 5312-13.

233. During calendar year 1991, Raystay was also in the process of attempting to refinance its existing debt and obtain additional debt financing for the company. Toward that end, Raystay retained the investment banking firm of Community Equity Associates ("CEA") to assist in locating a suitable lender. Sometime during the second quarter of 1991, Raystay began negotiating with Greyhound Financial Corporation ("Greyhound") regarding the

refinancing of Raystay's businesses. Tr. 5051-52.

234. Greyhound expressed the position during negotiations in August or September 1991 that no proceeds of any loan from Greyhound could be used for the LPTV construction permits. Sandifer understood that if Raystay wanted to develop the LPTV stations, the money to do so would have to come from a source other than Greyhound. TBF Ex. 261, p. 2; Tr. 5058-62. This limitation on the use of Greyhound's loan proceeds was memorialized in drafts of a Loan and Security Agreement that were circulated in January 1992 and again in June 1992. TBF Exs. 262, 263; Tr. 5074, 5076-77. Raystay and Greyhound ultimately executed a Loan Agreement in July 1992. TBF Ex. 264; Tr. 5052. Raystay's agreement with Greyhound contained the prohibition on using loan proceeds for the development of the LPTV construction permits. Tr. 5086-87. George Gardner was aware when he signed the refinancing agreement with Greyhound that the loan proceeds could not be used to fund the construction of the LPTV stations. Tr. 5294-95. Had he wanted to build the stations, George Gardner would have personally funded the project. Tr. 5298.

235. Sandifer claims to have made inquiries at times in 1991 and 1992 with one or two Carlisle area banks as well as a national firm about obtaining financing for TV40 and the development of the construction permits. However, Sandifer's inquiries never went beyond the preliminary stage, none of the institutions was willing to provide loans without personal guarantees or other collateral, and George Gardner did not make the task of obtaining financing for the construction permits a priority because of the lack of an acceptable business

plan. Tr. 5095-5100.

236. By the end of the 18 month construction permit period, no equipment had been ordered and no physical construction of the LPTV stations had commenced at either the Lebanon or Lancaster sites. Tr. 4591. George Gardner refrained from ordering equipment and constructing the stations because no business plan had yet been developed which he believed would be financially viable. George Gardner had no idea in December 1991 when or even if a viable business plan would ever be developed. Tr. 5236-37. Nevertheless, George Gardner still held out hope that the stations would be constructed. He directed his staff to continue to explore all potential business plans and to entertain any expression of interest in the LPTV construction permits that an outside party might present, including an expression of interest in buying the authorizations from Raystay. Tr. 5235-36. George Gardner was interested in preserving the construction permits in the event that a deal to use or sell the authorizations materialized. TBF Ex. 245; Tr. 5277-78.

237. It was David Gardner's responsibility to coordinate the preparation and filing of Raystay's applications for additional time within which to construct the two Lebanon and two Lancaster LPTV stations. Tr. 4680.³⁴ In December 1991, David Gardner had a telephone conversation with John Schauble (Schauble"), an associate attorney with Cohen & Berfield. Tr. 4682-83. During the conversation David Gardner answered a number of questions put to

³⁴ Raystay did not file an application seeking an extension of time within which to construct the Red Lion station because Raystay was working to assign the construction permit for that facility. Tr. 4591-92.

him by Schauble about the status of the LPTV construction permits. On the basis of the information derived during the telephone conversation, Schauble drafted a two page exhibit in support of the four extension applications. Tr. 4683-85.

238. On December 12, 1991, Schauble transmitted by facsimile to David Gardner the draft exhibit. TBF Ex. 242; Tr. 4684. On the facsimile cover sheet, Schauble requested David Gardner to review the draft exhibit carefully to ensure its accuracy. TBF Ex. 242. David Gardner understood Schauble's request to mean that he (David Gardner) should make any changes to the draft that he felt were appropriate. Tr. 4685. In a subsequent telephone conversation, David Gardner informed Schauble that the draft exhibit was accurate. Tr. 4685.

239. Thereafter, on December, 16, 1991, Schauble sent David Gardner four completed extension applications on FCC Form 307, each accompanied by the same exhibit that David Gardner had previously approved. Schauble requested David Gardner to have a Raystay officer review and sign the applications in advance of filing them with the Commission. TBF Ex. 243; Tr. 4685-86.

240. David Gardner reviewed the applications for, among other things, factual accuracy. Tr. 4686. He then directed the applications and supporting exhibits to Sandifer for Sandifer's review. TBF Ex. 244; Tr. 4686. Sandifer represented an intermediate level of review between David Gardner and George Gardner. Tr. 4686-87, 5030. Sandifer also

reviewed the applications. Sandifer did not have personal knowledge of everything that was stated in the applications. Nevertheless, he made no attempt to discuss the contents of the applications or exhibits with either David Gardner or with Etsell. Sandifer does not recall recommending to George Gardner that George Gardner make any revisions in the applications. Tr. 5038-39.

241. Before signing the applications, George Gardner made no revisions; he did not discuss their contents with anyone; he did not review any files or other documents to verify any of the representations; and he does not recall reading the official directions for completing the applications. George Gardner relied on Cohen & Berfield to make sure that the applications were properly prepared. Tr. 5247-52. After signing the applications, George Gardner returned them to David Gardner who, in turn, sent them to Schauble. Tr. 3687- 3688, 4690-91. The four extension applications and accompanying exhibits were filed with the Commission on December 20, 1991. TBF Ex. 245; Tr. 4688.³⁵

242. The purpose of the accompanying exhibit in each application was to provide justification to the Commission for Raystay's request for an extension of time. Each of the four identical exhibits stated that Raystay was the current licensee of an operating LPTV station in Dillsburg, Pennsylvania. Each exhibit also represented that although equipment for the particular unbuilt station had not been ordered or delivered, Raystay had conducted

³⁵ File Nos. BMPTTL-911220IX, BMPTTL-911220JB, BMPTTL-911220JF, and BMPTTL-911220JI.

discussions with equipment suppliers, entered into lease negotiations with representatives of the owner of the proposed antenna site, and, along with an engineer, had visited the antenna site and ascertained what site preparation work and modifications needed to be performed. Each exhibit further stated that Raystay had conducted research to determine the programming that would be provided on the station, engaged in discussions with programming suppliers, and was involved in continuing negotiations with local cable franchises on the subjects of programming and carriage. Raystay also stated that the Commission's failure to grant the extension of time would eliminate the possibility of a new LPTV service in the community because no entity other than Raystay had expressed an interest in providing such service. TBF Ex. 245, pp. 3-4, 7-8, 11-12, 15-16.

243. However, equipment had not been ordered and construction had not started on any of the four LPTV stations by December 1991 because Raystay was still trying to formulate a business plan that would have a reasonable expectation of being successful. Tr. 4692. As of December 1991, George Gardner did not believe that Raystay had yet developed or been presented with a viable business plan for the stations. Tr. 4692. None of the extension applications that was filed in December 1991 revealed this information. Tr. 4695. Furthermore, none of the applications revealed that Raystay had been actively involved in attempting to sell the authorizations. TBF Ex. 245.

244. As noted above, each of the four extension applications that was filed in December 1991 represented, among other things, that Raystay "has entered into *lease*

negotiations with representatives of the owners of the antenna site specified in the applications, although those negotiations have not been consummated." TBF Ex. 245, p. 3 (emphasis added). The reference to "lease negotiations" in each of the two Lancaster extension applications was based on a one-minute telephone conversation that David Gardner had had with someone at the Ready Mixed Concrete Company in October 1991. Similarly, the reference to "lease negotiations" in each of the two Lebanon extension applications was predicated on a one-minute telephone conversation between David Gardner and someone at the Quality Inn Hotel, also in October 1991. TBF Ex. 228; Tr. 4702-05, 4718. David Gardner telephoned both the Ready Mixed Concrete Company and the Quality Inn Hotel in October 1991 to arrange for the inspection of the two transmitter sites by TBN's engineer, Tom Riley, in contemplation of selling the construction permits to TBN. Tr. 4707.

245. David Gardner claims that his brief telephone conversations with individuals at the two transmitter sites constituted "negotiations" because he recalls that there was some question in his mind prior to the conversations about the availability of the two sites and that after the discussions he felt satisfied that the sites were still available. Tr. 4740. David Gardner concedes, however, that neither conversation involved any discussion about a "lease." Tr. 4907. Sandifer understood the phrase "lease negotiations" to have meant that Raystay had had discussions about terms and conditions of leasing the transmitter sites. Tr. 5156-57. He did not inquire of David Gardner or make any effort to find out whether in fact such lease negotiations were being or had been conducted. Tr. 5156-57. George Gardner, too, made no effort to verify the accuracy of the reference in the applications to "lease

negotiations" before he signed them. Tr. 5257. He did not know when any such lease negotiations had taken place; he did not know how many negotiating sessions there had been; he did not know what points had been reached or what points were in dispute; and he did not know whether there were any further negotiations scheduled. Tr. 5256.

246. Each of the four extension applications that was filed in December 1991 also stated that "[a] representative of Raystay *and an engineer* have visited the antenna site and ascertained what site preparation work and modifications need to be done at the site." TBF Ex. 245, p. 3 (emphasis added). None of the four extension applications revealed the identity of the "engineer." The engineer to whom the extension applications referred was Tom Riley, who had inspected the two transmitter sites in October 1991 on behalf of TBN. Tr. 4741-42. George Gardner believed the reference in the extension applications to "engineer" was to Greg Daly, whom Raystay had retained some three years earlier to locate suitable transmitter sites in contemplation of filing the original applications for the four construction permits. Tr. 5261.

247. The applications for extensions of time within which to construct the four LPTV stations were granted on January 29, 1992. The Commission gave Raystay until July 29, 1992, to construct and commence operations of the new stations. TBF Ex. 247. In 1992 and with George Gardner's approval, Raystay continued to entertain expressions of interest from individuals interested in buying the four construction permits. Tr. 5046-48.

248. Near the end of June 1992, Schauble sent David Gardner a letter regarding the need to prepare a new round of extension requests. TBF Ex. 249. Schauble's correspondence included a copy of the exhibit that Raystay had attached to each of its initial extension applications. The letter requested David Gardner to examine the exhibit to determine whether it needed to be updated or otherwise modified. TBF Ex. 249. Schauble and David Gardner had a telephone conversation to discuss the status of the construction permits. Again, David Gardner answered questions put to him by Schauble. Tr. 4847. Based on his telephone conversation with David Gardner, Schauble prepared the new extension applications and sent them to David Gardner for review and George Gardner's signature. Attached to each application was a supporting exhibit which was *identical* to the supporting exhibit that Raystay had attached to each of its initial extension applications. TBF Ex. 250; Tr. 4847-48.

249. After he reviewed the new set of extension applications, David Gardner passed them on to his father to be signed. Sandifer did not review the second set of extension applications because he was unavailable. Tr. 4848. George Gardner did not discuss the contents of the applications with anyone before he signed them. After George Gardner signed the applications, they were returned to Cohen & Berfield and then filed with the Commission on July 9, 1992. TBF Ex. 251; Tr. 5283.³⁶

³⁶ File Nos. BMPTTL-920709IM, BMPTTL-920709IN, BMPTTL-920709IK, and BMPTTL-920709IJ.

250. As of July 1992, no effort had been made to construct any of the four LPTV stations because Raystay still had no business plan that George Gardner considered financially viable. Tr. 4853, 5280-81. Moreover, despite Raystay's representations to the contrary in each of the supporting exhibits, neither David Gardner, George Gardner, nor Sandifer is aware of any lease negotiations between Raystay and the Ready Mixed Concrete Company or Quality Inn Hotel between December 1991 (when the first set of extension applications was filed) and July 1992 (when the second set of extension applications was filed). Tr. 4853-54; 4922, 5042, 5286. Additionally, neither David Gardner nor George Gardner has any recollection of any on-site inspections of either transmitter site by a Raystay engineer during the same period. Tr. 4854; 4922-23, 5286-87. Furthermore, David Gardner knows of no discussions with equipment *or* program suppliers specifically involving the four construction permits by anyone at Raystay between December 1991 and July 1992. Tr. 4921-24. During this period, Sandifer did not personally focus on efforts to develop the Lancaster or Lebanon LPTV stations. He undertook no activities to develop the construction permits during that time, and he received no directives from George Gardner to do so. Tr. 5163-64. In July 1992, when the second set of extension applications was filed, George Gardner had no idea whether Raystay would ever construct the LPTV stations. Tr. 5281.

251. Raystay's second set of extension applications was granted by the Commission on September 23, 1992. The Commission gave Raystay until March 23, 1993, to complete construction and place the stations in operation. The Commission's decision to grant the extension applications was expressly predicated on Raystay's representations that it had

entered into negotiations with representatives of the antenna sites and that it had undertaken research in an effort to determine programming. TBF Ex. 252.

252. Following the grant of the second set of extension applications, Raystay continued to entertain offers to buy the construction permits, although George Gardner denies that he wanted to sell the authorizations. Tr. 5050, 5282-83. By March 1993, George Gardner had not yet approved the ordering of equipment or commencement of construction. At that time, he made the decision not to seek any further extensions from the Commission and to turn the construction permits in for cancellation. Tr. 4860-61, 5043-44. Raystay relinquished the two Lancaster and two Lebanon construction permits to the Commission on March 23, 1993. TBF Ex. 255.

2. Misrepresentation in LPTV Assignment Application

253. In early 1989, David Gardner informed Berfield that Raystay intended to file five applications for new LPTV stations in the Lancaster, Lebanon, and Red Lion (Pennsylvania) areas. Berfield gave David Gardner a range of between \$5,000 and \$6,000 as the package price for the legal services involved in preparing and filing the five applications. Berfield did not advise David Gardner that the price for preparing and filing the first application would be any more than the price for preparing and filing any of the remaining four applications. Tr. 5404.

254. Thereafter, Raystay retained Cohen & Berfield to prepare and file the five LPTV applications. Raystay also retained Robert Hoover, a consulting engineer, to prepare the engineering portions of the applications. Berfield initially commenced work on the Red Lion application because Raystay already owned the property on which the Red Lion station was to be located. The Red Lion application became the model or prototype for the other four applications. Tr. 5404-06, 5590. As noted above, the five LPTV applications were filed with the Commission in March 1989. The Commission granted the applications in July 1990. TBF Exs. 203-208.

255. By October 1991, Raystay had received offers to purchase its five LPTV construction permits. As a consequence, Sandifer requested David Gardner to begin accumulating cost information for the five authorizations. David Gardner examined available

invoices, reviewed company records, and prepared a handwritten compilation of Raystay's expenses. The compilation itemized Raystay's expenses according to Commission filing fees, consulting engineering fees, site-location fees, and legal fees. TBF Ex. 273; Glendale Ex. 227, p. 19; Tr. 5587-88, 5700. Sandifer considered the compilation to be a preliminary outline of Raystay's costs that was not necessarily complete. Tr. 5589.

256. Sometime in late October or early November 1991, David Gardner requested Berfield to determine the reimbursable expenses to which Raystay would be entitled if the bare authorizations were assigned. Glendale Ex. 227, p. 1. On November 7, 1991, Berfield sent to David Gardner a letter which itemized Raystay's legitimate and prudent expenses *for all five* of Raystay's LPTV authorizations. TBF Ex. 232. According to Berfield's letter, Raystay had incurred legal expenses totaling \$15,397.03, filing fees in the amount of \$1,875, and engineering expenses of \$7,275 from Robert Hoover, a consulting engineer. Also, Berfield indicated that Raystay was entitled to reimbursement of \$1,092.01, which represented the amount paid to Jim Daly of Telsa Corporation to locate suitable antenna sites for Raystay's Lancaster and Lebanon stations. TBF Ex. 232.

257. Berfield determined the total legal fees for the five construction permits by examining invoices and time sheets of his law firm. Glendale Ex. 224, pp. 2-5; Tr. 5445. Berfield did not examine any invoice from Robert Hoover in order to determine Raystay's legitimate engineering expenses. Rather, Berfield obtained the \$7,275 figure for Robert Hoover's services from David Gardner. Glendale Ex. 224, p. 5; Tr. 5468.

258. In late November or early December 1991, Sandifer agreed on behalf of Raystay to sell the Red Lion authorization to Grosat for \$10,000. Sandifer did so before he had any knowledge or understanding as to the extent of Raystay's reimbursable expenses for the one construction permit. David Gardner informed Berfield that Raystay had decided to sell the Red Lion construction permit for \$10,000, and he requested Berfield to provide a list of its reimbursable expenses. Tr. 5407, 5565-66. Berfield's November 7, 1991, letter had identified Raystay's reimbursable expenses for all five LPTV construction permits. Berfield understood that he had to determine how much of those expenses should be allocated to the Red Lion construction permit, which was the only authorization being sold. Tr. 5409.

259. After his conversation with David Gardner, Berfield referred back to his correspondence of November 7, 1991, to calculate the amount attributable to the Red Lion construction permit. Berfield also researched the subject of allocating expenses among multiple construction permits. In the course of his research, Berfield reviewed Integrated Communication Systems, Inc. of Massachusetts, 5 RR 2d 725 (Rev. Bd. 1965). Tr. 5407-13. Berfield discussed the matter of reimbursable expenses with Sandifer. They discussed, among other things, the possibility of associating a greater percentage of the legal costs to one particular application because all of the applications were generally similar except for some basic information. Tr. 5581.

260. Berfield knew that if he calculated the Red Lion expenses on a strictly pro rata basis (that is, by dividing the overall legal and engineering expenses by five), Raystay would

not have been able to justify the \$10,000 sales price for the Red Lion construction permit. Accordingly, Berfield determined Raystay's legitimate and prudent expenses for the Red Lion construction permit by taking one-third of the overall LPTV engineering expenses and one-half of the overall LPTV legal expenses specified in his November 7, 1991, letter. Glendale Ex. 224, pp. 7; Tr. 5413. Berfield allocated one-half of the legal fees to the Red Lion authorization on the theory that most of the fees for such work *could* be allocated to Red Lion (or to any other individual construction permit that might be the first or only permit to be assigned) since the work relating to any one of the construction permits also related to each of the other construction permits. Glendale Ex. 224, p. 7. Berfield did not review Cohen & Berfield invoices to ascertain exactly what services his law firm had provided which were directly related to the preparation, filing, and prosecution of the Red Lion application. Tr. 5508, 5544.

261. Berfield claims that the figure for legal fees that he assigned to the Red Lion construction permit was conservative and that he could have allocated more -- perhaps as much as 95% of Raystay's total legal expenses for the Lancaster, Lebanon, and Red Lion permits -- to the Red Lion authorization if he had deemed it necessary. He simply specified a figure of 50% because the resulting amount sufficed to justify, in terms of reimbursable expenses (when combined with Raystay's other expenses), the \$10,000 figure that Raystay had already agreed to accept for the sale of the Red Lion construction permit. Tr. 5516, 5525, 5540, 5543.

262. Berfield's rationale for allocating one-third of all LPTV-related engineering expenses -- \$2,425 -- to the Red Lion authorization is that only three transmitter sites were ultimately specified for the five stations. Glendale Ex. 224, p. 10. Berfield claims to have been unaware at the time that Hoover charged Raystay on the basis of the number of applications involved, not the number of transmitter sites. Hoover's invoice specified an identifiable fee for each of the five applications. TBF Ex. 277; Tr. 5532-33, 5537-39. That is, Hoover charged Raystay \$1,500 for each application less a 10% discount, plus a \$175 charge for preparing each of the three Federal Aviation Administration forms. In preparing his estimate of reimbursable expenses for the Red Lion construction permit, Berfield made no effort to contact Hoover, David Gardner or anyone else connected with Raystay to ascertain what Hoover may have charged for the Red Lion engineering. Tr. 5536.

263. Berfield provided David Gardner with the numbers and his theory for allocating the expenses. Berfield did not advise David Gardner or Sandifer that Raystay should disclose to the Commission that a one-third/one-half allocation scheme was being employed to justify the \$10,000 sales price for the Red Lion construction permit. Tr. 5414-15, 5576.

264. David Gardner signed the Certification of Expenses which was included with the Red Lion assignment application even though he knew the figure in the certification for engineering expenses exceeded the figure on Hoover's invoice. Tr. 5711-12. Sandifer signed the application on behalf of Raystay. The assignment application was filed on January 13, 1992. TBF Ex. 241; Glendale Ex. 228, pp. 2, 5.

265. When he signed the application, Sandifer knew that the reimbursable expenses that Raystay was claiming were based on an allocation of expenses incurred among multiple construction permits. Tr. 5581, 5584. Sandifer accepted the Certification of Expenses as being accurate because it was signed by David Gardner who advised Sandifer that it was accurate. Glendale Ex. 228, p. 5. George Gardner did not review the Red Lion assignment application before it was filed because he was unavailable. Tr. 5638-39. The application for consent to the assignment of the Red Lion construction permit from Raystay to Grosat, as filed with the Commission in January 1992, did not contain any notice to the Commission that an allocation had been made among several construction permits in order to determine Raystay's reimbursable expenses. TBF Ex. 241; Tr. 5422.

IV. Conclusions of Law

A. Trinity Issues

1. De Facto Control

266. The issue to be resolved is whether Crouch, TBN or its affiliates exercised *de facto* control over NMTV. In examining a licensee's operations to determine whether there has occurred an unauthorized exercise of *de facto* control, the Review Board has indicated that *all* aspects of the operation are examined for "telltale signs" of undisclosed dominion:

It is well established that "control," as used in the [Communications] Act [of 1934, as amended] and pertinent Commission rules, encompasses all forms of control, actual or legal, direct or indirect, negative or affirmative, and that the passage of *de facto* as well as *de jure* control demands the prior consent of the Commission It has been stated many times that the Commission is not bound by any exact formula in its determination of whether control of a broadcast licensee has been transferred in violation of Section 310(b) of the Communications Act. Indeed, the Act does not spell out a formula which shall govern in such cases. The ascertainment of control in most instances must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented.

The Seven Hills Television Company, 2 FCC Rcd 6867, 6878 (Rev. Bd. 1987), citing, Stereo Broadcasters, 55 FCC 2d 819, 821 (1975); see also, Univision Holdings, Inc., 7 FCC Rcd 6672, 6675 (1992). The Commission analyzes issues involving control on a case by case basis. See Turner Broadcasting System, 101 FCC 2d 843, 848 (1985); Storer Communications Corp. v. FCC, 763 F.2d 436, 442 (D.C. Cir. 1985).

267. Generally, a party will be deemed to have control over a licensee where the party is in a position to control the operation or policies of the licensee or its station. See Arnold L. Chase, 6 FCC Rcd 7387, 7409 (ALJ 1991), citing, WHDH, Inc., 17 FCC 2d 856, 863 (1969), aff'd sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 922 (1970); High Sierra Broadcasting, Inc., 55 RR 2d 627 (Rev. Bd. 1983). The principal indicia of *de facto* control include governance of policies regarding (1) finances, (2) personnel, and (3) programming. See Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981). Control can also be found where a party dominates the management of the corporate affairs of the licensee, including the prosecution of its FCC application or the construction of its station. Arnold L. Chase, 6 FCC Rcd 7387, 7409 (ALJ 1991), citing, Benjamin L. Dubb, 16 FCC 274, 288 (1951).

268. In the instant case, it is beyond question that TBN has exercised *de facto* control over TTI and its successor NMTV. This determination is based on the overwhelming evidence of record which establishes that at all relevant times TTI/NMTV has marched in absolute lockstep with TBN. TBN has controlled TTI/NMTV insofar as TTI/NMTV's purpose, corporate composition, programming, personnel, and finances are concerned. Furthermore, and equally significant, TBN has held out to the public that TTI/NMTV is a mere operating division of TBN with no plans or incentive to break away.

Corporate Purpose

269. The evidence reveals that TBN founder, Paul Crouch, created TTI/NMTV for the purpose of developing a network of translators that would rebroadcast TBN programming. Thus, from its inception, Crouch never intended for TTI/NMTV to be anything more than another vehicle to carry out TBN's mission of spreading the gospel over the airwaves. Indeed, TTI/NMTV's governing documents reflect a singular goal which all but mimics that of TBN. Although Crouch claims to have intended for TTI/NMTV to some day become independent of TBN, it is apparent that he never altered his view of TTI/NMTV as a fledgling subsidiary totally dependent on TBN for money, supervision, and overall direction. In fact, to this very day, TTI/NMTV has never developed, much less implemented, any plan to "break away" from its parent company, TBN.

Corporate Composition

270. At TTI/NMTV's inception, Crouch named himself as the company's president despite the claim that he intended to create a company which would be owned and controlled by minorities.³⁷ However, the company's governing documents make absolutely no reference to Crouch's claimed objective of forming a company that would be owned, controlled, or operated by minorities. Crouch remained TTI/NMTV's chief officer through the hearing.

³⁷ A non-stock corporation such as TTI/NMTV, of course, has no "owners" in the traditional sense. It has a board of directors whose members hold certain specific rights granted to them by the company's articles and bylaws.

Although the company's bylaws have always permitted up to ten directors to serve on TTI/NMTV's governing board, the number never exceeded four, and, during most of TTI/NMTV's existence, did not go beyond three. Of those three, a majority of TTI/NMTV's board *always* consisted of persons who were employees, officers, or directors of TBN. Thus, in initially naming himself and fellow TBN director Duff to TTI/NMTV's board and in limiting the number of directors who actually served, Crouch ensured that he would retain iron clad control over the affairs of TTI/NMTV. Hence, it was unnecessary for TTI/NMTV's governing documents to contain the same "protections" against Crouch's removal as did TBN's bylaws.

271. The non-TBN members of TTI/NMTV's board of directors were, by and large, "outsiders" in every sense of the word. Phillip David Espinoza, who ostensibly served as TTI/NMTV's initial Chief Financial Officer, never performed any duties which attended that position. He never had better than a vague understanding about TTI/NMTV's financial condition. He never questioned any information appearing in TTI/NMTV's financial statements, including information which suggested that the company was heavily in debt during a time when it was, for all intents and purposes, inactive. When TTI/NMTV decided to sell the Odessa full power television station, Espinoza did not know the sales price or the fair market value of the station. Espinoza never knew the identity of TTI/NMTV's attorneys, and May & Dunne never sent him copies of correspondence which they directed to Crouch or Duff. Espinoza played little, if any, role in selecting the communities for which TTI/NMTV filed construction permit applications. He was not involved in preparing any

applications or reviewing them before they were filed with the Commission. Espinoza made it very clear to Duff and Crouch from the time he became a director that his first obligation was to his church, not TTI/NMTV. Although he served as a director of TTI/NMTV for some ten years, Espinoza essentially deferred to Crouch and Duff on virtually all significant matters during that time. Indeed, apart from the fact that he is a minority, Espinoza's reluctance or inability to play an active or meaningful role in TTI/NMTV's affairs is, perhaps, an equally significant reason why he was selected to be a director of TTI/NMTV in the first place. In any event, Espinoza's passive involvement in TTI/NMTV proved to be entirely compatible with Crouch's desire to maintain complete control of the company that he had founded.³⁸

272. When Espinoza resigned, Crouch and Duff found in his replacement, Phillip Aguilar, an individual who also was too busy or too inexperienced to represent a threat to Crouch's continued dominance of TTI/NMTV. Aguilar attended only 50% of the board meetings held during his tenure as a director. During that time, Aguilar remained ignorant -- either by his own choice or by the intentional actions of Crouch and Duff -- about such things as the identity of TTI/NMTV's engineers, the disposition of contributions from viewers in Odessa and Portland, the extent of TTI/NMTV's debt to TBN, and the methods by which TTI/NMTV selected markets for which construction permit applications for

³⁸ Espinoza appears to have once exercised independent judgment when he opposed Crouch's motion to sell the Odessa construction permit just days after TTI/NMTV acquired it. Nevertheless, Crouch, who controlled the source of TTI/NMTV's funds, ultimately prevailed in his desire to sell the station.

translator stations were filed. Aguilar was, of course, also beholden to Crouch because of TBN's continuing financial support of Aguilar's Set Free Christian Fellowship, Inc.

273. When May & Dunne expressed concerns about Aguilar's failure to attend board meetings and his failure to provide reliable information about his prior criminal conviction for child assault, Crouch heeded the law firm's recommendation and arranged to have another minority added to TTI/NMTV's board. The person selected was Edward V. Hill, a long time member of the TBN "family." Hill had been a TBN program host for several years. He also appeared on TBN telethons and at TBN rallies. In return, TBN periodically gave Hill money for various charitable projects involving his church, and TBN paid Hill honoraria ranging from \$3,000 to \$20,000 per year. Although Hill was a more active director than either Espinoza or Aguilar, he had little impact on the company. Despite Hill's suggestions, TTI/NMTV did not attempt to acquire additional full power or existing low power television stations, and it made no effort to loosen or sever its close ties to TBN. Furthermore, like Aguilar, Hill remained ignorant about fundamental matters involving the composition and operation of TTI/NMTV. For example, Hill did not know the maximum number of directors specified in the TTI/NMTV bylaws; he believed that TTI/NMTV's board of directors included the general manager of TTI/NMTV's Portland station, Jim McClellan, when it did not; he did not know how many LPTV stations TTI/NMTV owns or the programming that they broadcast; he did not know whether Crouch or Duff is compensated by TTI/NMTV; he had no knowledge about the Portland station's revenues,