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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In re Applications of	)	MM Docket No. 93-75
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	File No. BRCT-911001LY
	)	
For Renewal of License of Television Station WHFT(TV) Miami, Florida	)	
	)	
GLENDALE BROADCASTING COMPANY	)	File No. BPCT-911227KE
	)	
For Construction Pedmit for New Television Station in Miami, Florida	)	

To: The Honorable Joseph Chachkin
Administrative Law Judge

REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (RED LION ASSIGNMENT APPLICATION ISSUE)

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October 7, 1994

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List ABCDE

TABLE OF CONTENTS

Page

Table of Contents.....i

Table of Authorities.....ii

I. SUMMARY.....1

II. INTRODUCTION.....2

III. TBF PROPOSED FINDINGS ARE GENERALLY UNRELIABLE; BUREAU PROPOSED FINDINGS ARE PARTIALLY UNRELIABLE.....3

A. The Use of Improper Characterizations.....3

B. The Standard for Judging the Expense Certification.....10

C. Mr. Berfield's Belief that the Expense Certification is Correct.....12

D. Whether Mr. Berfield Reviewed the Hoover Invoice.....13

Testimony of Mr. Berfield.....14

Testimony of David Gardner.....16

Document Documentary Evidence Supporting Mr. Berfield's Testimony.....17

Absence of Documentary Evidence Contradicting Mr. Berfield's Testimony.....18

E. Where did David Gardner get the Expense Certification Figures From?.....18

IV. THE STANDARD FOR REIMBURSABLE EXPENSES.....20

V. RAYSTAY'S LEGAL EXPENSES.....28

VI. RAYSTAY'S ENGINEERING EXPENSES.....35

VII. THE FORM OF THE EXPENSE CERTIFICATION.....36

VIII. NO INTENT TO DECEIVE.....39

IX. CONCLUSION.....52

TABLE OF AUTHORITIES

Page

JUDICIAL DECISIONS:

Continental Broadcasting, Inc., 14 RR2d 827 (Examiner Honig 1967), 15 FCC2d 120, 14 RR2d 813 (1968) (Chairman Hyde dissenting), recon. denied, 17 FCC2d 485, 16 RR2d 30 (1969), affirmed sub nom. Continental Broadcasting, Inc. v. FCC, [20 RR2d 2126] (D.C.Cir. 1971), cert. denied, June 7, 1971.....48

RKO General, Inc. (WNAC-TV), 78 FCC2d 1, 47 RR2d 921, affirmed sub nom. RKO General, Inc. v. FCC, 670 F.2d 215 (D.C.Cir. 1981).....46

Sea Island Broadcasting Corp. of S.C., 60 FCC2d 146, 37 RR2d 1235 (1976), recon. denied, 64 FCC2d 721, 40 RR2d 1053 (1977), affirmed sub nom. Sea Island Broadcasting Corp. of S.C. v. FCC, 627 F.2d 240, [46 RR2d 1339] (D.C.Cir. 1980).....50

WHW Enterprises, Inc. v. FCC, 758 F.2d 1132, 1139 (D.C.Cir. 1985).....44

WWOR-TV, Inc. 7 FCC Rcd. 636 (1992), affirmed sub nom. Garden State Broadcasting v. FCC, 996 F.2d 386 (D.C.Cir. 1993).....46

ADMINISTRATIVE DECISIONS:

Amendment of §73.3597 of the Commission's Rules, 52 RR2d 1081 (1982), on recon., 99 FCC2d 971 (1985).....26

Calhoun County Broadcasting Co., 57 RR2d 641, 646 (1985).....26

Cannon Communications Corp., 5 FCC Rcd. 2695, 2705 n.18, 67 RR2d 1159, 1166 n.18 (Rev.Bd. 1990).....39

Character Policy Statement, 102 FCC2d 1179, 59 RR2d 801 (1986).....45

Community Telecasters of Cleveland, Inc., 43 FCC2d 540, 542-43 28 RR2d 1018 (1973).....27

Comparative Broadcasting Proceedings, 6 FCC 85 (1990), on recon., 6 Fcc Rcd. 2901 (1991).....26

Dirigo Broadcasting, Inc., 4 RR2d 273
(Rev.Bd. 1965) 27

Faulkner Radio, Inc., 88 FCC2d 612, 50
RR2d 814 (1981) 50

Fox River Broadcasting, Inc., 93 FCC2d
127, 129, 53 RR2d 44, 46 (1983) 39

Gross Broadcasting Co., 41 FCC2d 729,
730-731, 27 RR2d 1543, 1545 (1973) 39

Golden Broadcasting Systems, Inc., 68 FCC2d 1099,
43 RR2d 881 (1978) 51

Horsehoe Bay Centex Broadcasting Co., 5 FCC Rcd.
7125, 7128 (1990) 26

Integrated Communications Systems Inc. of
Massachusetts, 5 RR2d 725 (Rev.Bd. 1965) 23-26,38,39

Memorandum Opinion and Order,
FCC 93M-469 (released July 15, 1993) 42

Prattville Broadcasting Co., 4 FCC2d 555,
8 RR2d 120 (Rev.Bd.), recon. denied,
8 RR2d 1096 (1966), review denied,
FCC 67-549 (1967) 49

Report and Order (Low Power Television
Service), 51 RR2d 476, 517 (1982) 26

Scott & Davis Enterprises, Inc.,
88 FCC2nd 1090, 1099, 50 RR2nd 1251, 1258
(Rev.Bd. 1982) 13

Scott & Davis Enterprises, Inc., 54 RR2d 868,
869 (1983) 26

TVue Associates, Inc., 5 FCC2d 421, 422,
8 RR2d 862 (1966) 27

United Broadcasting Co. of Florida, Inc.,
55 FCC2d 832, 35 RR2d 119 (1975), recon. denied,
60 FCC2d 816, 38 RR2d 225, petition to set aside
decision dismissed, 39 RR2d 448 (1976) 50

United Broadcasting Co. of Florida, Inc.,
100 FCC2d 1574, 57 RR2d 485, 16 RR2d 30 (1969) 50

Urban Telecommunication Corp., 7 FCC Rcd. 3867,

3870 (1992) 26

STATUTES AND REGULATIONS:

Section 73.3597(c) (2) 20,21

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REPLY TO PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
(RED LION ASSIGNMENT APPLICATION ISSUE)

1. This reply is addressed to the proposed findings and conclusions on the Red Lion assignment application issue filed by Trinity Broadcasting of Florida, Inc. (TBF) and the Commission's Mass Media Bureau (Bureau) on August 15, 1994. The reply of Glendale Broadcasting Company (Glendale) on the other issues is being submitted in a separate document by Cohen and Berfield, P.C., Glendale's general counsel.

I.
SUMMARY

2. In this reply, we respond to the proposed findings of fact of TBF and the Bureau. The proposed findings of TBF are particularly suspect, often inappropriately slanting or interpreting the evidence in the record, and sometimes simply stating the record incorrectly.

3. In this reply, we respond to the proposed conclusions of law of TBF and the Bureau. In so doing, we address each of the citations that have been given to case decisions and other authorities. For the convenience of the Court and counsel, we are submitting a Table of Authorities so that our treatment of the precedent can be found without difficulty.

II.
INTRODUCTION

4. TBF argues that the certification of expenses submitted by Raystay Co. in its application to assign its construction permit for an LPTV station at Red Lion, Pennsylvania was a misrepresentation and lack of candor and that Glendale must therefore be disqualified. TBF Findings, ¶¶388-438 at 275-305, TBF Conclusions, ¶¶724-742 at 500-514. The Bureau agrees with TBF that the certification was a misrepresentation and lack of candor, but it concludes that the issue must be resolved in favor of Glendale because George Gardner, the common link between Raystay and Glendale, had no role in preparing, reviewing or signing the Red Lion assignment application. Bureau Findings, ¶¶253-265 at 127-132, Bureau Conclusions, ¶¶341-348 at 177-181. In fact, the record shows that the certification of expenses was a true and correct document, and neither TBF nor the Bureau can cite to one rule, case or policy that shows that the expense allocations made by Morton L. Berfield, Esquire, of Cohen and Berfield were incorrect. Furthermore, TBF and the Bureau have absolutely no evidence that anyone associated with Raystay had

any intent to deceive the Commission. The issue must be resolved in favor of Glendale.

III.
TBF PROPOSED FINDINGS ARE GENERALLY UNRELIABLE; BUREAU PROPOSED FINDINGS ARE PARTIALLY UNRELIABLE

5. The proposed findings of TBF are fundamentally unreliable, and the reader of them is well advised to check the record citations and then sort out fact from fiction in the findings which TBF has authored. The proposed findings of the Bureau are unreliable in certain respects. In arguing that the calculations done by Mr. Berfield were incorrect, both TBF and the Bureau substitute incorrect, pejorative characterizations for hard evidence. They make arguments which run directly contrary to rulings of the Presiding Judge without even acknowledging that those rulings were made. TBF makes claims that are directly contrary to record evidence and makes an indefensible accusation that Mr. Berfield lied which is totally contrary to the hearing record. These findings cannot be accepted at face value. In this section, Glendale will point out some of the more egregious distortions that have been made.

A.
The Use of Improper Characterizations

6. TBF and the Bureau repeatedly attempt to "prove" that the certification of expenses was incorrect by using phraseology and characterizations that are simply wrong.

7. For instance, the Bureau claims in ¶347 of its conclusions (at 180) that "Raystay knew when it filed the assignment application with the Commission that the reimbursable

expenses it was seeking bore no relationship to the actual, documented costs that it had incurred in connection with preparing, filing and advocating the grant of the Red Lion construction permit application." TBF makes a similar argument in ¶730 of its proposed conclusions (at 505): ("Moreover, the legal and engineering figures that were precisely listed in Raystay's certification did not reflect the actual costs of the Red Lion permit."). This unuseful thinking misses the entire point of this hearing issue, i.e., whether an allocation of expenses to one of a group of construction permits was reasonable. The expenses were actual, they were paid, they were real. For the most part they were not incurred solely for a single, identifiable application. That is why an allocation had to be made and then its reasonableness now must be assessed. But it makes no sense to fault Mr. Berfield and his client for not being able to tie individual expenses to the Red Lion application when most of the expenses were not incurred for any individual application. If he is to be faulted for that, then, in all situations where expenses are incurred in the aggregate for a group of applications or construction permits, no expenses can be recovered for any one of the individual applications separately, they can be recovered only for the entire group as a whole. That, of course, cannot be the law.

8. For another instance, TBF argues that Raystay should have known that the certification was improper because:

> Grolman had made clear to Sandifer that Raystay could only recover its documented

> out-of-pocket expenses in connection with the sale of the unbuilt permit.

TBF Conclusions, ¶731 at 506 (emphasis added). What is TBF's point? That Mr. Grolman's interpretation of the Commission's reimbursement rule was notice of the irrational interpretation now advanced by TBF that unless the expense can be explicitly tied to one of the applicataions in a group, it cannot be allocated at all? That Mr. Grolman's statement to Mr. Sandifer about the Commission's reimbursement rule took precedence over the advice of Raystay's communications attorney for the past 30 years, Mr. Berfield, who advised Mr. Sandifer that a reasonable allocation of expenses could be made? That Mr. Grolman's communications attorney, Mr. Tillotson, knows the law in this area better than Mr. Berfield, a former Bureau trial attorney and long time private practitioner who researched the legal question before making his allocation? Again, at all times we and TBF are talking about expenses that were in fact incurred and paid out-of-pocket by Raystay. There is no issue over that. The issue is the reasonableness of the allocation.

9. Here is another illustration of the irrational and argumentative prose that contaminates the findings and conclusions proposed by TBF. TBF refers to Mr. Berfield's figures as "manufactured 'guesstimates'" (TBF Conclusions, ¶733 P. 508). Whatever Mr. Berfield did, he did not "guesstimate": he had previously reviewed all of his law firm's legal invoices and had a precise figure for the total legal expenses in connection with all the permits. He also had other expense information from

David Gardner. He conducted legal research, and then used a conservative and reasonable approach to determine what portion of the total expenses would be allocated to the Red Lion permit. Moreover, TBF's preferred approach is less precise than what Mr. Berfield did. TBF argues that he should have adopted a straight pro rata division and ignore the relationship between the expenses and the work done. TBF's reliance on "names" such as "guesstimates" instead of record testimony and sound legal reasoning does not assist the Court in dealing with the hearing record and arriving at a determination regarding the reasonableness of the expense allocation.

10. In a number of places TBF employs the phrase "claims" or "avers" or similar words to propose findings regarding testimony of a witness called by Glendale even though there is not a shred of evidence to caste doubt on that testimony. For example, in ¶408 at 286, TBF proposes findings that Mr. Berfield "averred" that his firm's initial $5,200 fee comprised $4,000 for one application and $300 each for four additional applications and that Mr. Berfield "claimed" that he prepared the Red Lion application first, and then the other four applications. This is sophomoric brief writing. Mr. Berfield didn't "aver" or "claim" anything. He testified. There is no record basis to question that testimony. A direct finding of fact, free of any doubt or reservation, is warranted based on that testimony. This is the

case with respect to all other instances of this phraseology in the proposed findings and conclusions of TBF [1]:

(a) In ¶417 at 291, TBF proposes the finding that Mr. Berfield "allegedly" recalled that the channel studies had been conducted by transmitter location, that Mr. Hoover had charged a fixed fee for each of those studies, and that Raystay eventually filed applications for three of the locations. TBF provides two citations for its nonsense of using the word "allegedly": Glendale Ex. 224 at 10 and Tr. 5533. Let us look at them. In his written direct testimony, Mr. Berfield testified under oath:

> In that initial work, the client provided to Mr. Hoover various transmitter locations in which it had an interest and Mr. Hoover performed studies of the frequencies that would be available for LPTV operations from those locations. I recalled that Mr. Hoover had charged a fixed fee for each of the locations that he surveyed. We ended up filing applications on three of those locations, i.e., Red Lion, Lebanon and Lancaster. For these three locations, attached are copies of Mr. Hoover's letters (Apppendix E, pages 46-48 of this exhibit) with copies of the frequency studies pertaining to Red Lion (Appendix F, pages 49-55 of this exhibit), Lebanon (Appendix G, pages 56-66 of this exhibit) and Lancaster (Appendix H, pages 67-75 of this exhibit). I assumed that the engineering figure given to me by David Gardner included Mr. Hoover's flat fee for each location for the initial frequency study work. This in my mind suggested a division of the engineering fee in thirds.

Ex. 224 at 10. Under cross examination by counsel for TBF, Mr. Berfield testified as follows:

> Q. How is it that you came upon the figure of one-third?

---

[1] With one arguable exception, i.e., Mr. Berfield's testimony about not seeing the engineering invoice and TBF's unprincipled misuse of David Gardner's testimony to brand Mr. Berfield a liar. We deal with that situation shortly, at ¶¶12-16.

> Now, if that receipt reflects that Mr. Hoover charged Raystay $1,500 less some discount for the Red Lion C.P. and a certain amount also for FAA work, whatever amount is reflected on the bill, that represents expenses that Raystay incurred specifically for the Red Lion C.P.
>
> JUDGE CHACHKIN: I don't agree with you frankly. I think -- I think in determining whether it was reasonable of Mr. Berfield to allocate it in the manner in which he did, it's necessary to know exactly what work Mr. Hoover did and not the fact that Mr. Hoover might've decided on his own to -- the way he broke it down, but it seems to me the substance is important...
>
> We're dealing with what was reasonable and the reasonableness, it seems to me, is based on what work was performed for each application, just as a lawyer. If a lawyer might've said, for instance -- done the exact same allocation, but in fact, if the lawyer did most of the work and billed most of the work, his hours, on behalf of one application as opposed to the other application, not withstanding his invoice, that would govern what's reasonable.

Tr. 5733-5734. Consistent with this ruling, Glendale made a detailed showing as to how Mr. Berfield's figures correlated to the legal and engineering work performed. Glendale Findings, ¶¶22-36 at 14-23.[2]

12. TBF and the Bureau don't take issue with the Judge's ruling or offer some form of argument why they think he was wrong and should reconsider his ruling. They just ignore it. And they

---

[2] Unless otherwise stated, a reference to the "Glendale Findings" will refer to the special volume of proposed findings and conclusions filed by undersigned counsel with respect to this issue.

ignore the correlation of Mr. Berfield's figures to the legal and engineering work performed. Unencumbered by the Judge's ruling or this record evidence, TBF and the Bureau make the unthoughtful argument, mantralike, that Mr. Hoover's engineering invoice conclusively shows that it was improper for Mr. Berfield to allocate one-third of the engineering expenses of which he was aware to the Red Lion application. TBF Findings and Conclusions, ¶¶415-416, 730 at 290-291, 505-506, Bureau Findings and Conclusions, ¶¶262, 346 at 131, 180.

13. At the conclusion of the hearing sessions, there was considerable discussion among counsel and the Court regarding the Hoover invoice. Tr. 5728-5735, copies attached as Appendix A for handy reference. During that discussion, the Court made it clear that it was not going to accept the five-way breakdown of the engineering statement as "speaking for itself" because the question is the amount and nature of the services rendered as to which Glendale had made its record. All parties were put on notice of the Court's attention, and none expressed any desire to extend the hearing proceedings for the purpose of eliciting testimony from Mr. Hoover.

C.
Mr. Berfield's Belief that the
Expense Certification is Correct

14. TBF proposes the misleading finding that Mr. Berfield now concedes that his allocation of $2,425 of the engineering fees to the Red Lion permit was improper. TBF Findings, ¶420 at 294, see also TBF Conclusions at 505, n.115. That proposed

finding is just plain wrong. Mr. Berfield repeatedly expressed his opinion that he believes Raystay's certification based on his analysis of the figures was correct. Glendale Ex. 224 at 13, Tr. 5416-5417. Moreover, Mr. Berfield's explanation that he could have allocated expenses differently if he had known of the separate $1,000 payment for the Red Lion frequency search (Glendale Ex. 224 at 11-12) does not show that what he did was wrong. Indeed, the existence of the additional payment shows that TBF's and the Bureau's arguments concerning engineering expenses are frivolous because, even under their own theory, the actual engineering expenses were $100 higher than those claimed by Raystay. See Glendale Findings, ¶¶35-36 at 22-23.

D.
Whether Mr. Berfield Reviewed the Hoover Invoice

15. The most pernicious part of TBF's proposed findings is its claim that Mr. Berfield "completely fabricated" his testimony when he testified that he did not have the Hoover invoice in his files in 1991 and that he got the $7,275 figure for engineering expenses from David Gardner. TBF Findings, ¶¶419-420 at 292-294. In Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1099, 50 RR 2d 1251, 1258 (Rev. Bd. 1982), the Board warned applicants that misrepresentation and lack of candor are very serious charges that "ought not be bandied about." TBF's charge without any effort to accurately or honestly deal with the testimony of Mr. Berfield, the testimony of David Gardner and the documentary evidence in the record is scurrilous and merits censure of the authors. It is one thing to set forth the record evidence in a

reasonably fair-handed way and then argue from that factual analysis -- very vigorously if appropriate -- the conclusion that best favors a party's cause. That is the advocacy system of litigation. But TBF has not done that. It has (a) accepted as gospel inconclusive and inconsistent testimony of David Gardner due to lack of recall, (b) treated as totally untruthful the conclusive and consistent testimony of Mr. Berfield based upon clear recall, (c) ignored documentary evidence in support of Mr. Berfield's clear recollection and recall and (d) ignored the absence of documentary evidence in support of testimony incorrectly attributed to David Gardner. There is no excuse for this.

16. Testimony of Mr. Berfield. Mr. Berfield was clear and consistent in this testimony that he did not have any invoice from Mr. Hoover in his possession and that he secured the $7,275 figure from David Gardner. In his direct testimony, Mr. Berfield stated:

> With respect to engineering fees in the amount of $2,425, at the time I allocated this amount to the Red Lion permit in December 1991, I did not have before me a copy of any invoices of the engineer. I had the dollar figure in the amount of $7,275 given to me on the phone by David Gardner. I divided this amount into thirds, and listed $2,425 for Red Lion. [Then goes on to explain his rationale for the one-third allocation]

Glendale Ex. 224 at 9. Under cross examination, Mr. Berfield testified as follows:

> Q. Okay. Let's move forward to a date more recently when you had your conversation with David Gardner and David Gardner gave you the figure of 7,000+ dollars as the amount that Mr. Hoover had charged Raystay for his engineering services. My question for you is what was

your understanding as to what the $7,000+ figure included?

A. I -- to the best of my recollection I think it included all of the engineering to date.

Q. What does that mean, Mr. Berfield?

A. Well, that would mean the, the engineering work he'd done in the site -- the original site searches plus the preparation and filing of the applications, the notifications to the FAA and subseqeunt FAA work that was involved relating to the EMI problem at the Red Lion site. I thought the figure was an aggregate figure.

Q. What does that mean?

A. Encompassing the services of Mr. Hoover I've just described.

Q. So it was your understanding that that 7,000+ dollar figure included all the work that Mr. Hoover had performed relating to the five low power applications plus the, the work done for locating the six sites?

A. No. I think just the -- well, I think just the three sites. I believe that's all. I wasn't -- I knew that there had been site work done and I knew there, of course, had been applications prepared and I knew there was an EMI problem and I just thought that was the amount for the CPs.

Q. Now, you had no, no bills before you when you provided Mr. Gardner with the $2,425 figure. Did you make any efforts to call or contact in any way Mr. Hoover concerning the total amount of his services.

A. I don't think I did.

Q. Did you ask David Gardner or anyone else connected with Raystay or Raystay's companies about Mr. Hoover's bills?

A. Well, when Mr. Gardner first called up and said he wanted me to recap the expenses, the aggregate project that led to the November 7th letter, I said well, I've got the legal stuff and I know the filing fees, but you'll have to give me Mr. Hoover's bills and -- or Mr. Hoover's -- I don't mean the bills. You have to give me Mr. Hoover's number and the -- also Greg Daly number, and Mr. Gardner gave me those numbers.

> Q. So you created the November 7, 1991 letter where you included the figure $7,275?
>
> A. Yes.
>
> Q. And then when it came time to provide David Gardner with the expenses which are contained on page 26 of your testimony you merely took one-third of that?
>
> A. That's right.

Tr. 5535-37.

17. Testimony of David Gardner. TBF distorts David Gardner's testimony beyond recognition. If one reads the transcript of his testimony, it is perfectly clear that David Gardner has no personal recollection of where the $7,275 figure came from. At his deposition, he indicated that he did not recall whether Mr. Berfield indicated to him he had a copy of the Hoover invoice. Glendale Ex. 230 at 43. He frankly admitted he had no independent recollection of where the figure came from. Glendale Ex. 231 at 32-33. Although he testified that it was his understanding that Mr. Berfield would have had access to the invoice (Glendale Ex. 231 at 32), his understanding was based upon the fact that the invoice surfaced in the document production. Glendale Ex. 231 at 32-33. Concerning the conversations he had with Mr. Berfield in preparation for this proceeding, he could not recall Mr. Berfield telling him who he got the engineering figure from. Glendale Ex. 231 at 34. Just before that answer, he expressed his belief that Mr. Berfield had told him "that at some point in time he received either the invoice or the figure in his preparation of his November 7, 1991, letter." Glendale Ex. 231 at 33-34 (emphasis added). In short,

while David Gardner made a good faith attempt to answer the questions, his recollection is too unclear to make any finding as to whether or not Mr. Berfield had the Hoover invoice.

18. TBF also attacks Mr. Berfield's testimony by claiming that David Gardner could not have given Mr. Berfield that figure because he thought the figure was incorrect. TBF Findings, ¶419 at 293. TBF distorts the testimony here. At Tr. 5709, it is clear that David Gardner (correctly) thought there were more engineering fees, but all he could verify was the one invoice from Hoover. Therefore, he could only find evidence of $7,275 in engineering expenses. Moreover, David Gardner gave Mr. Sandifer the same $7,275 figure for engineering expenses in his note dated October 17, 1991. Glendale Ex. 227 at 19. If David Gardner gave the figure to Mr. Sandifer on October 17, there is no reason why he would not give the figure to Mr. Berfield a short time later.

19. Documentary evidence supporting Mr. Berfield's testimony. The record shows that the documents produced in this proceeding from the files of Cohen and Berfield have a "Received Cohen & Berfield" stamp and usually have a handwritten file number indicating what file the documents are to be placed into. See Tr. 5454-5455. Neither of the two versions of the Hoover invoice produced in this proceeding has either the received stamp or the file notation. Glendale Ex. 224 at 117, TBF Ex. 277 at 1-2.

20. Absence of documentary evidence contradicting Mr. Berfield's testimony. The record does not reflect any documentary evidence contradicting Mr. Berfield's testimony. Nor, for that matter, is there any documentary evidence corroborating the testimony that TBF incorrectly attributes to David Gardner.

E.
Where did David Gardner get the Expense Certification Figures From?

21. In its pursuit of a misrepresentation angle at all costs, TBF argues that David Gardner did not receive any expense certification figures until he received the certification for signature on December 30 or 31, 1991, and that Raystay has misrepresented the facts in its testimony that Mr. Berfield provided the figures to David Gardner by telephone at an earlier date. TBF Findings and Conclusions, ¶¶424-426, 729 at 296-297, 504-505. TBF challenges the testimony of Mr. Berfield that he gave David Gardner the figures over the telephone and explained them before Mr. Berfield went on vacation on December 20, 1991, as well as Mr. Cohen's testimony that David Gardner gave him the figures when David Gardner requested the certification of expenses.

22. Again, to arrive at this argument, TBF (a) accepts as gospel testimony attributed to David Gardner when his actual testimony was that he didn't recall, (b) rejects the clearly recalled testimony of both Mr. Berfield and Mr. Cohen about the

manner in which the expense certification was prepared and (c) rejects other evidence in support of their testimony.

23. Mr. Berfield testified that he gave David Gardner the figures in late November or December 1991. Glendale Ex. 224 at 7. He described the conversation as follows (Tr. 5413):

> When I gave the figures to Mr. Gardner it was a short conversation. I, I told him that I thought he could take one-third of the engineering and one-half of the legal fees and the filing fees. I gave him the numbers and I told him briefly what my theory was. I don't think I mentioned the [Integrated] case to him. He's not a lawyer.

Mr. Cohen corroborated Mr. Berfield's testimony that David Gardner had the figures by testifying that he received the figures from David Gardner in their telephone conversation. Glendale Ex. 225 at 2.

24. Nothing in the David Gardner testimony cited by TBF undercuts their testimony in the least. First, the fact that David Gardner did not recall any conversations concerning the legal fee figure is not competent evidence that the conversation did not take place, particularly since David Gardner testified with respect to the certification:

> I have no recollection of this matter independent of recognition that the signature is mine and the date is my handwriting.

Glendale Ex. 227 at 3. Furthermore, his belief that he first "saw" the figure in the certification is consistent with Mr. Berfield's and Mr. Cohen's testimony: one does not "see" a number that is relayed by telephone.

25. Moreover, TBF ignores a major logical flaw in its argument. If David Gardner did not get the figures from Mr. Berfield in late November or early December, there is nobody who could have given him the figures on December 30 or 31. Mr. Berfield was away on holiday. Glendale Ex. 224 at 7. Mr. Cohen was unfamiliar with any of the details of the Red Lion transaction. Glendale Ex. 225 at 1. Mr. Schauble was also away on holiday. Glendale Ex. 225 at 1-2. Only Mr. Berfield could have given David Gardner the figures, and that clearly happened before Mr. Berfield went on vacation.

IV.
THE STANDARD FOR REIMBURSABLE EXPENSES

26. As Glendale has shown above, TBF and the Bureau fail to follow the standard set by the Presiding Judge for reviewing the reasonableness of the allocation made by Mr. Berfield: the relationship between the allocation and the work that was done. A closer view of the facts and the law provide further proof that the standard sought by TBF and the Bureau, i.e., an unanalytical linear arithmetic pro-ration, is not reasonable or supported by precedent.

27. In ¶726 of its proposed conclusions (at 502), TBF emphasizes that Section 73.3597(c)(2) of the Commission's rules is a "no-profit" rule. It is beyond dispute that Raystay never received any "profit" from the sale of the Red Lion permit. Raystay had expenses approaching $30,000 in its LPTV applications, and the $10,000 did not even approach its total expenses. Nor is there any record basis to dispute that Raystay

never intended to achieve a profit in the event of the sale of the other four permits at some future date.[3] Furthermore, the remaining construction permits were turned in for cancellation in March 1993. TBF Ex. 255.

28. Section 73.3597(c)(2) of the Commission's rules lists the two types of legitimate and prudent expenses for which reimbursement may be sought: costs of "preparing, filing, and advocating the grant of the construction permit for the station", and costs "for other steps reasonably necessary toward placing the station in operation." TBF suggests that in order for expenses to be reimbursable, those expenses must solely be attributable to only one construction permit or station. TBF Conclusions, ¶724 at 500. The rule does not support that interpretation. Nothing in the rule states that expenses must be disallowed if they fall within one of the two categories permitted by the rule but also could be said to relate to another permit. The purpose of the word "solely" in the rule is not to disallow expenses that relate to more than one permit but to make clear that the two categories of expenses listed are the only types that may be reimbursed. So long as the costs are legitimately and prudently expended and fall within one of the

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[3] The $30,000 target figure for all five construction permits consisted of $10,000 for Red Lion and $5,000 each for the possible sale of the other four permits to Trinity. Glendale's Proposed Findings, ¶10 at 5-6 and record citations therein. The Bureau in ¶228 at 114 proposes a finding that David Gardner received and processed documents regarding the possible sale of all five permits to Trinity including Red Lion. This is not correct. David Gardner pulled and took no action regarding the documents received from Trinity relative to Red Lion. Glendale Ex. 227 at 2.

two categories described in the rule, it is irrelevant whether the expenses could also be said to relate to another permit. Of course, Raystay could not have sought reimbursement for the same expenses twice, but that was never Raystay's intention. See Glendale Ex. 228 at 4.

29. In arguing that Raystay's allocation was improper, TBF contradicts itself. On the one hand, it argues that "virtually none of those fees could be attributed specifically to the Red Lion permit." TBF Conclusions, ¶730 at 505. The plain meaning of that argument is that any expenses that related to more than one permit could not be claimed for any permit. Under that reasoning, Raystay's reimbursable expenses for any of the permits would be almost zero because virtually none of the expenses concerned work for only one permit. It would be patently illogical to totally prohibit Raystay or any other similarly situated party from ever recouping expenses because those expenses could be said to relate to more than one permit.

30. In ¶421 of its proposed findings (at 294), TBF abandons that argument. It does not argue that the reimbursable expenses should be zero but (essentially) one-fifth of the total expenses.[4] Thus, TBF cannot accept its own suggestion. It is

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[4] The $1,350 figure for engineering expenses is a clear error under TBF's own theory because it allows no credit for the FAA filing fee for Red Lion. As noted in its August 27, 1993 motion to enlarge issues (at P. 7), TBF's belief is that the proper engineering charges are $1,525 ($1,350 for the application, and $175 for the FAA filing).

not arguing that an allocation of expenses among a group of permits which cannot be assigned to a specific permit is improper, but that Raystay was required to employ a different allocation than the "services rendered" basis which it used, but rather that of an unanalytical linear arithmetic pro rata allocation.

31. TBF suggests that there was something improper in the language of the certification describing the expenses as being "incurred by Raystay in obtaining the construction permit being assigned" (TBF Findings, ¶388 at 275, TBF Conclusions, ¶732 at 507). This is a quibble. There is no inconsistency between that language and the fact that Mr. Berfield used allocations to calculate the expenses. Mr. Berfield believed the language in the certification was accurate. Tr. 5416. The issues in this matter are not over this choice of words in the certification. The issues in this matter are over whether the method of allocation was reasonable (it was) and whether it was incumbent on Raystay to state that an allocation between multiple construction permits had been made (it was not).

32. TBF (TBF Conclusions, ¶¶731-732 at 506-507) and the Bureau (Bureau Conclusions, ¶¶344-345 at 178-179) set forth their arguments relative to the Review Board's decision in Integrated Communications Systems Inc. of Massachusetts, 5 RR 2d 725 (Rev. Bd. 1965). In our opening proposed findings and conclusions, we also set forth our views of the Integrated case supporting what Mr. Berfield did. Glendale Conclusions, ¶¶68-71 at 38-40. The