

196. *Air & Sea Rescue Training Command* This civilian group works with the U.S. Navy to coordinate volunteer work during local disasters, such as hurricanes and riots. During Appearances on WHFT(TV), the executive director solicited volunteers to help following riots in South Miami in 1988. TBF Ex. 18.

197. *Mercy and Truth Ministries, Inc.* This organization operates a 12 month drug and alcohol therapeutic residential program, primarily serving persons in South Dade County and Florida City. The pastor credits receipt of a number of calls from addicts seeking help to this appearance on WHFT(TV). TBF Ex. 19.

198. *Hogar Renacer* This organization provides counseling, training and rehabilitation services to persons with criminal records and/or substance abuse problems. The director attributes "many communications requesting information about its services and training" and donations of time and services by volunteers to his appearances on WHFT(TV). TBF Ex. 32, p.3.

199. *Daily Bread Food Bank, Inc.* This entity has facilities in Miami, Fort Lauderdale and West Palm Beach. It solicits and stores food which it then distributes through various cooperating food programs that feed indigent or homeless people. The director praises WHFT(TV) for its "His Hand Extended" program and its efforts to distribute food to the needy and for undertaking installation of facilities to meet the city of Hollywood's requirements for a "food handler." TBF Ex. 22, pp. 1-3.

200. *Christ-Centered Life Ministries* This organization works primarily with inner-city residents with drug and alcohol problems. It also provides literacy training and help for those studying for their GED. The pastor states that appearances on WHFT(TV) have led to contributions and people volunteering to help and that at least 10 people have come for help with their problems. TBF Ex. 24.

201. *Glory of God* This entity operates a drug and alcohol rehabilitation center for men. A counsellor relates that the entity received "a great deal of response from [his] appearance on [WHFT(TV)]." TBF Ex. 25.

202. *Kendall Christian Center* The center has a program to assist migrant workers in South Florida. The pastor states that his appearances on WHFT(TV) led to donations and volunteers and that the station also donated food, particularly turkeys for Thanksgiving. TBF Ex. 25.

203. *Positive, Inc.* This organization seeks to rehabilitate street gang leaders and members by promoting positive changes in their behavior. After the appearance of its executive director on WHFT(TV), the organization received "numerous calls from people in the community who said they had seen or heard about the show, including street gang members, potential gang members, parents and even other television stations, inquiring about the organization's rehabilitation program. Positive, Inc. also experienced an increase in the number of people who began participating in the program after watching or hearing about the show, and also witnessed a decrease in the level local street gang activity." TBF Ex. 26, p. 3.

204. *First Baptist Church of Fort Lauderdale* The church conducts "Divorce Recovery Workshops." The workshops run from eight to ten weeks three times per year. The person who leads the workshops believes that her appearances on WHFT(TV) led to calls from people wanting help or information. TBF Ex. 29.

205. *Issues of Life Ministry* This organization provides food and clothing to the homeless and needy. The former pastor states that he was encouraged by WHFT(TV) to appeal for help, which led to contributions of food and clothing as well as volunteers to help with the ministry. TBF Ex. 30.

206. SALAD also submitted public witness affidavits. One is from the former president of the Miami-Dade Branch of the NAACP, who states that WHFT(TV) was the only area television station that did not meet with the NAACP's communications committee to discuss hiring practices and public affairs programming. The former president also faulted WHFT(TV) for not responding to announcements, press releases and meeting notices sent by the NAACP in the station's programming, PSAs or otherwise. SALAD Ex. 17, pp. 1-2.

Licensee Record of Compliance with the FCC Rules and Policies

207. TBN and TBF share the same directors and are controlled by the same principals. (See Findings 138-139). The findings relative to issues (a) and (b), *supra*, are therefore germane to the licensee's record of compliance with the FCC Rules and Policies during the renewal period and are incorporated herein by reference.

WHFT(TV) Community Activities

208. During the renewal period, WHFT(TV) was involved in a number of non-broadcast activities which demonstrate efforts at community outreach. The most significant of these was a service called "His Hand Extended." Station personnel and volunteers received donations of clothing and food and distributed such items to needy persons and organizations in the Miami area. TBF Ex. 5, p. 2; TBF Ex. 6, p. 3; TBF Ex. 7, pp. 3-4; TBF Ex. 13, p. 3; TBF Ex. 16, p. 3; TBF Ex. 18, p. 5; TBF Ex. 21, p. 4; TBF Ex. 27; TBF Ex. 30, 2. Collection and distribution took place at a location adjacent to the station's studio. TBF Ex. 14, p. 6. "His Hand Extended" operated either three or four days per week (amounting to at least 20 hours per week), 52 weeks per year throughout the license term, except for a two month period during which renovations occurred. TBF Ex. 32, pp. 2-6. TBF's record indicate that 30,633 persons were helped, and that the station distributed thousands of pounds of clothes and toys. TBF Ex. 32, p. 7; TBF Ex. 32, Tab A. If a person needed additional assistance, TBF referred the person to an organization that could provide long-term help. TBF Ex. 32, p. 4.

209. The second most significant was the station's "Prayer Line." The "Prayer Line" is a 24 hour telephone line on which people can call for prayer or for help. The "Prayer Line" operated throughout the license term. TBF Ex. 32, p. 7. The vast majority of callers asked for a prayer or reported a religious experience. TBF Ex. 33, p. 17. If those who called for help, the station provided: referrals to facilities providing treatment for drug and alcohol problems, counsel to the lonely or depressed; assistance and/or referrals to appropriate agencies to victims of spouse abuse; assistance and/or referrals to appropriate agencies to females with an unexpected pregnancy; referrals to agencies to help the homeless and hungry; and referrals to entities providing financial or family counselling. TBF Ex. 4, pp. 3-4; TBF Ex. 7, pp. 2-3; TBF Ex. 10, p. 4; TBF Ex. 13, p. 4; TBF Ex. 14, p. 3; TBF Ex. 15, p. 2; TBF Ex. 16, p. 3; TBF Ex. 18, p. 4; TBF Ex. 19, p. 3; TBF Ex. 21, pp. 4-5; TBF Ex. 25, p. 3; TBF Ex. 32, pp. 7-9; TBF Ex. 33, p. 18.

Those answering the "Prayer Line" at the station kept a book which listed various social service and church agencies, updated periodically by the station, in order to refer the person to an appropriate agency. TBF Ex. 33, p. 18; TBF Ex. 33, Tab K. If the person seeking help gave his or her name, the station followed up by notifying the agency that a referral had been made. TBF Ex. 33, p. 19. In addition, the "Prayer Line" allowed viewers to call to comment about the station's programming. TBF Ex. 32, pp. 7-9. During the license term, the station received at least 1300 calls per month on the "Prayer Line." TBF Ex. 32, p. 8; TBF Ex. 33, Tab L.

B. Glendale Issues

Lancaster/Lebanon Extension Application

210. George Gardner is the owner of fifty-one percent of Glendale's stock. He is one of the two directors of Glendale, as well as its President, Treasurer, and Secretary. George Gardner is also the sole voting stockholder of Raystay Co. (Raystay), which is the owner and operator of several cable television systems. Glendale Ex. 208, p. 2. He is Raystay's sole director, its President, and its Chief Executive Officer. Tr. 5199. He founded Raystay in 1968, and he has controlled Raystay since that time. Tr. 5199-5200.

211. George Gardner also owns Waymaker Company (Waymaker). Waymaker provides management services to Raystay and other companies. Glendale Ex. 208, p. 1; Tr. 4534, 4966. Additionally, George Gardner owns GH Cable Properties (GH Cable). George Gardner and Harold Etsell, Jr. (Etsell) formed GH Cable in 1987 to acquire cable television properties. GH Cable presently has ownership interests in cable Television systems in Mississippi and Arizona. After GH Cable was formed, George Gardner acquired Etsell's interest in the company.

212. David Gardner is George Gardner son. Tr. 4531. David Gardner is employed by Waymaker as the company's Contract Manager. Glendale Ex. 209, p. 1; Tr. 4534, 4542. As Contract Manager, David Gardner negotiates, drafts, reviews, and secures contracts for different types of services and products. He has worked on contracts involving the purchase of programming, acquisition of advertising, leasing of office space and equipment, employment, the purchase and sale of cable television facilities, the sale of LPTV construction permits, and financing. Pursuant to George Gardner's directive, David Gardner is also Raystay's liaison with the company's communications counsel, the law firm of Cohen & Berfield. In his capacity as liaison, David Gardner works with Raystay's communications counsel to secure authorizations from the FCC and other government bodies which are necessary for the operation of Raystay's cable television and LPTV facilities. Glendale Ex. 209, p. 1; Tr. 4542-4548. David Gardner's duties as liaison include, among other things, reviewing for accuracy applications which Raystay intends to file with the FCC. David Gardner has no specific written procedures for reviewing the accuracy of Raystay's FCC applications. Although he is not an engineer and has never had any formal engineering training, David Gardner has reviewed

engineering documents on behalf of Raystay. David Gardner's father, George Gardner, is an engineer. Tr. 4551-4553.

213. David Gardner owns shares of stock in Raystay, although the percentage of his equity interest is presently in dispute. Tr. 4533. David Gardner was an officer of Raystay from 1973 to 1989. Tr. 4538-4539. Although he has not been an officer of Raystay since April 1989, he has been active in Raystay's affairs through his work at Waymaker. Tr. 4540. Prior to April 1989, David Gardner reported directly to George Gardner. Commencing in April 1989, David Gardner reported to Etsell and then Lee Sandifer (Sandifer). Tr. 4561- 4562, 4971.

214. Lee H. Sandifer began work for Raystay and Waymaker Company (Waymaker) in June 1990. Tr. 4966. Sandifer is Chief Financial Officer of Waymaker and he has been a Vice President of Raystay from early 1991 to the present. Tr. 4968. Sandifer has been responsible for supervising accounting and financial operations during the term of his employment. Tr. 4969-4970. He started supervising David Gardner and the contract management area in the late summer or fall of 1990. Tr. 4970. From August 1991 to the fall of 1993, he was in charge of operations for TV40. *Id.* Since June 1990, Sandifer has reported to George Gardner. *Id.*

215. Harold Etsell first became involved in a business relationship with George Gardner in 1987 when they formed GH Cable Company. George Gardner and Etsell served together on the Pennsylvania Cable Television Association board of directors for a number of years. TBF Ex. 265, p. 6. In 1988, Etsell became a full-time employee of Waymaker and assumed a direct management role in Raystay. TBF Ex. 265, p. 7. Etsell did not work out of Raystay's offices in Carlisle—he worked out of his house or an office in Boothwyn, PA. TBF Ex. 265, pp. 4, 14-15. He was a Vice President of Waymaker until his termination date of October 1, 1993, and he was a Vice President of Raystay from 1989 until his termination. TBF Ex. 265, pp. 7-8. Etsell's role began as overseeing various projects for Raystay and acting as Chief Operating Officer of GH Cable. TBF Ex. 265, pp. 10-11. Etsell became the Chief Operating Officer of Raystay and Waymaker and stayed in that role until the end of the first quarter of 1991. For most of 1991, he concentrated on the GH properties. He then became involved again in Raystay until October 1993 when he retired. TBF Ex. 265, p. 11.

216. In March 1989, Raystay filed with the Commission applications on FCC Form 346 for authority to construct five LPTV stations, all in Pennsylvania,³² two were to be located in Lancaster, two in Lebanon, and one in Red Lion. Raystay contemplated that the two Lancaster antennas would be co-located atop a structure owned by the Ready Mixed Concrete Company in Lancaster. The two Lebanon application contemplated that both antennas would be co-located atop the Quality Inn Hotel in Lebanon.³³ The Red Lion application contemplated that the antenna would be located on property owned by Raystay. TBF Exs. 203-207.

217. Raystay employed Greg Daly of Telesat Company to locate the transmitter sites for the Lebanon and Lancaster stations. Thereafter, David Gardner supervised the prepara-

³² File Nos. BPTTL-890309PA, BPTTL-890309NY, BPTTL-890309TD, BPTTL-890309NZ, and BPTTL-890309NX.

³³ Although the Lancaster and Lebanon antennas were pro-

posed to be co-located, the stations' coverage areas would not have been the same. Tr. 4581.

tion of the five LPTV applications. David Gardner signed each of the five applications on behalf of Raystay. TBF Ex. 203-207; Tr. 4581-4585, 5205-5207.

218. The Commission granted the five construction permits to Raystay on July 24, 1990.³⁴ Each construction permit specified an expiration date of January 24, 1992. TBF Ex. 208; Tr. 4590.

219. After the grant of the construction permits in July 1990, George Gardner placed Etsell in charge of overseeing the development of the five LPTV stations. Tr. 4869-4871, 5208-5209, 5313. On February 12, 1991, Etsell prepared a Low Power TV Business Plan. TBF Ex. 210; TBF Ex. 265, p. 21-22. Etsell's Business Plan contemplated that Raystay's five LPTV stations and TV40 would be linked into a network to provide an alternative movie service, supplemented by local programming of interest to cable systems and their subscribers. Station TV40, which was already operational, was to be the flagship station for the regional network. The plan contemplated that the five new LPTV stations would be connected to TV40 by microwave link or over-the-air reception of the flagship station. TBF Ex. 265, p. 25; Tr. 4605, 5211.

220. Etsell's Low Power TV Business Plan was predicated on cable carriage. TBF Ex. 209; TBF Ex. 265, p. 36-37; Tr. 4594-4595, 5213. George Gardner shared Etsell's view that Raystay could not viably operate the five new LPTV stations without cable carriage. Tr. 4595, 5213. Sandifer believed that Raystay would not construct the LPTV stations until it had satisfactory commitments from cable systems to carry the five new LPTV stations and TV40. Tr. 5123.

221. In an effort to effectuate Etsell's Low Power TV Business Plan, Raystay made a number of contacts with program suppliers, equipment manufacturers, and cable television operators. Glendale Ex. 208, pp. 3-4; Glendale Ex. 209, pp. 3-4; Tr. 4601-4602, 4814-4817, 5127, 5214-5215.³⁵ In this connection, George Gardner believed that the cable television operators in the area generally supported Etsell's concept of creating a regional network of LPTV stations. However, there was no consensus among them as to the programming that the stations should provide. Each of the cable operations had a different set of requirements and Raystay was unable to develop a program concept that satisfied the objections expressed by the cable operators. Raystay obtained no commitment as a result of its discussions with cable operators. Tr. 5127, 5214-5215.

222. In the absence of a viable business plan which George Gardner defined as one that would break even on a projected three year basis, George Gardner was unwilling to proceed with the construction of the five LPTV stations. Tr. 5270-5274. When the five construction permits were granted in July 1990, TV40 was not operating profitably. In fact it was losing large sums of money. Tr. 4599-4600. Gardner had great difficulty selling advertising on the station and could not produce the revenue to cover its operating expenses. Tr. 5325. George Gardner's experience with TV40 convinced him not to go forward with construction in the absence of what he considered to be a viable business plan. Tr. 5270, 5277, 5325.

Preparation and Filing of December 1991 Extension Applications

223. By December 1991, Raystay had not started any construction of the Lebanon or Lancaster LPTV stations. Tr. 5236. On December 9, 1991, David Gardner sent a note to Morton L. Berfield at Cohen and Berfield asking that firm to prepare extension applications for the Lebanon and Lancaster construction permits. Glendale Ex. 209, pp. 203, TBF Ex. 267, Tr. 4680. Sandifer knew prior to this time that extension applications were going to be prepared based upon a conversation with John Schauble of Cohen and Berfield. Tr. 5187. George Gardner was uncertain whether he was aware that extension applications were going to be filed prior to the time he reviewed the applications. Tr. 5334. He believes he was probably asked if an extension application should be filed prior to work beginning on those applications, but he does not recall being asked that question. *Id.*

224. Shortly after David Gardner sent that note, he had a telephone conversation with Schauble. They discussed the preparation of applications to extend the construction permits. Schauble asked David Gardner a series of questions about what actions Raystay had taken with respect to the construction of these stations. While David Gardner does not remember the specific questions asked by Schauble, he generally remembers the topics discussed. Glendale Ex. 209, p. 3.

225. After the telephone call, Schauble prepared and sent David Gardner a draft of what became Exhibit 1 of the extension applications. *Id.* The facsimile cover sheet transmitting the exhibit to David Gardner contained the following message:

David: Enclosed is an exhibit I have prepared in support of the applications to extend the four LPTV construction permits. Please review the exhibit carefully to make sure it is accurate, then call me to discuss.

TBF Ex. 242. David Gardner understood that Schauble wanted him to make sure the exhibit was accurate and that Schauble was inviting him to make changes. Tr. 4685. David Gardner reviewed the draft Exhibit 1 and found the exhibit to be accurate. Glendale Ex. 209, p. 3. He and Schauble then had a subsequent phone conversation in which he told Schauble the exhibit was correct and acceptable. Glendale Ex. 209, p. 7, Tr. 4685.

226. Schauble then prepared the remainder of the applications and sent them to David Gardner. Glendale Exhibit 209, p. 7, TBF Ex., 243. The applications used the same Exhibit 1 that David Gardner approved. Glendale Ex. 209, p. 7.

227. Once David Gardner received the applications, he reviewed the applications to ensure that they were accurate and that there were no spelling or typing errors. Tr. 4686. He then submitted the applications to Sandifer for his review. Tr. 5028-5029. The normal practice was for David Gardner to submit anything to be signed by George Gardner to Sandifer for his review and approval. Glendale Ex. 209, p. 7, Tr. 4686, 5030. That practice was established in

³⁴ The stations were given the following call signs: W23AW, Lancaster, PA; W31AX, Lancaster, PA; W38BE, Lebanon, PA; W55BP, Lebanon, PA; and W56CJ, Red Lion, PA.

³⁵ Glendale's efforts to carry out its business plan are more fully discussed, *infra*.

the fall of 1990 when Sandifer became David Gardner's supervisor. Tr. 5031. David Gardner sent the applications to Sandifer with a note explaining what the applications were. TBF Ex. 244. Sandifer reviewed the documents for accuracy, and there was nothing in the applications that gave him trouble or caused him to extend his review process. Tr. 5039.

228. After reviewing the applications, Sandifer transmitted the applications to George Gardner. Tr. 5039. He does not recall recommending any changes to George Gardner. *Id.* Sandifer does not recall discussing the contents of the applications with David Gardner, George Gardner, Etsell, or FCC counsel. Tr. 5038-5039. When George Gardner received the four applications, he reviewed the entire Exhibit 1 that was part of all four applications. Glendale Ex. 208, p. 3, T. 5246. George Gardner believed that the exhibit outlined the business plan in most of its details and provided information to the Commission as to what Raystay had done. Tr. 5246. Also, he relied on the fact that the exhibit had been prepared by David Gardner whose job responsibilities included the preparation of applications, in conjunction with his Washington attorney, whose advice Raystay relied on as to what was needed to file an extension application. Tr. 5247-5249. David Gardner was not restricted by George Gardner from disclosing everything in the exhibit and the application that Washington counsel felt was needed. His review did not disclose anything omitted that was required. Tr. 5249-5250. He had personal knowledge of many of the statements in the exhibit, and he saw nothing he disagreed with. Tr. 5248.

229. George Gardner signed all four applications on December 18, 1991. TBF Ex. 245, pp. 2, 6, 10, and 14. George Gardner then returned the applications to David Gardner, who sent them to Schauble for filing. Tr. 4687-4688. The applications were filed with the Commission on December 20, 1991. TBF Ex. 245, pp. 2, 6, 10 and 14. The Commission granted each of the extension applications on January 29, 1992. TBF Ex. 247, pp. 1, 5, 9, 12. There is no evidence that the Commission requested any additional information before granting the applications.

Analysis of Exhibit 1

230. Exhibit 1 of each extension application filed on December 20, 1991 reads as follows:

"The permittee respectfully submits that a grant of the instant application would be in the public interest for the following reasons:

"Initially, it must be noted that Raystay Co. has built and is currently the licensee of LPTV station W40AF licensed to Dillsburg, PA. Raystay built the station pursuant to a construction permit issued to it by the Commission.

"At the present time, equipment for the station has not been ordered or delivered. Raystay, however, has had discussions with equipment suppliers concerning the types and prices of equipment that could be used at the site specified in the construction permit. It 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. 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.

"Raystay has undertaken research in an effort to determine the programming that would be offered on the station. It has had discussions with program suppliers to determine what programs could be available for broadcast on the stations. It has also had continuing negotiations with local cable television franchises to ascertain what type of programming would enable the station to be carried on local cable systems.

"The denial of this extension request would eliminate any possibility of the proposed LPTV service being offered to the community. No application mutually exclusive with Raystay's construction permit application was filed, so no other entity has expressed an interest in providing this service.

"Accordingly, Raystay requests that the Commission extend the date for construction for a period of six months from the date the current construction permit expires, which is later."

TBF Ex. 245, pp. 3-4, 7-8, 11-12, 15-16.

"Initially, it must be noted that Raystay Co. has built and is currently the licensee of LPTV station W40AF licensed to Dillsburg, PA. Raystay built the station pursuant to a construction permit issued to it by the Commission."

231. No evidence was offered challenging the truth of those statements. George Gardner knew that TV40 became operational on December 16, 1988. Tr. 5205.

"At the present time, equipment for the station has not been ordered or delivered."

232. George Gardner knew that that statement was correct. Glendale Ex. 208, p. 3. David Gardner was unaware of any equipment having been ordered or delivered. Glendale Ex. 209, p. 3, Tr. 4836-4838. There is no evidence that the statement was inaccurate. Tr. 4837.

"Raystay, however, has had discussions with equipment suppliers concerning the types and prices of equipment specified in the construction permit."

233. George Gardner had discussions with equipment suppliers concerning the types and prices of equipment specified in the construction permit. He had continuing discussions with Jaymar, a company that made solid state transmitters. Glendale Ex. 208, p. 3. The discussions began at an LPTV convention in the fall of 1989 and continued into the fall of 1990. Tr. 5271. Later, he had continuing discussions with Jaymar where they would send him information, and George Gardner would have telephone discussions with Jaymar concerning that information. Glendale Ex. 208, p. 4, Tr. 5271.

234. George Gardner also had discussions with two other transmitter manufacturers whose names he does not recall. He also had discussions with suppliers of studio and origination equipment, switching equipment, remote control equipment, and other equipment that would have been needed at the stations. George Gardner began such discussions at the LPTV convention in Las Vegas in the fall of 1990, and he periodically updated that information. Glendale Ex. 208, p. 4.

235. David Gardner also had discussions with equipment suppliers in 1989, 1990, and 1991. Tr. 4826, 4828. David Gardner had discussions with Bogner (an antenna manufacturer), tower suppliers, two transmitter suppliers, and wire suppliers (including Andrew) or representatives of such suppliers concerning equipment that could be used to build the Lancaster and Lebanon LPTV stations. Glendale Ex. 209, pp. 3-4. Some of his conversations were at the fall 1989 LPTV convention. Tr. 4827-4828. David Gardner became less active in talking with equipment suppliers after that convention. Tr. 4829. He was still having some discussions concerning studio equipment in 1991. Tr. 4830.

"It 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."

236. 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. 4702-4705, 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 a possible sale of TV40 and the construction permits to TBN. Tr. 4707. In the course of preparing the low power extension applications, David Gardner told Schauble that his communications with the Lancaster and Lebanon site owner representatives consisted of a single telephone conversation. Tr. 4705-4706. Gardner also told Schauble the contents of these discussions. Tr. 4738-4739, 4909.

237. David Gardner asserts that his telephone conversations with the site owner representatives can be fairly described as preliminary negotiations because 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. 4739-4741, 4906-4908. Apart from the question of site availability, David Gardner did not discuss specific lease terms. Tr. 4724-4726, 4731-4733.

238. David Gardner told Lee Sandifer in the fall of 1991 that he was having discussions with representatives of the Lancaster and Lebanon property owners. Tr. 4734, 5155. Sandifer understood it to be David Gardner's responsibility to negotiate the terms and conditions of such leases. Tr. 5156. David Gardner has much more knowledge in negotiating such leases than Sandifer. Tr. 5157. Sandifer did not inquire as to what specific negotiations had taken place with the antenna site representatives. Tr. 5156-5157.

239. George Gardner accepted the statement as reasonable because part of David Gardner's job responsibility was to negotiate such leases for Raystay. Glendale Ex. 208, pp. 4-5, Tr. 5256. George Gardner also knew that Sandifer had reviewed the exhibit and had passed the application on without raising any question. Glendale Ex. 208, p. 5. He did not have personal knowledge concerning the course or status of the lease negotiations. Tr. 5256-5257.

"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 this site."

240. The representative of Raystay referred to in this sentence is David Gardner. Glendale Ex. 209, p. 5. David Gardner visited the Lebanon site twice and the Lancaster site twice while the construction permits were outstanding. Glendale Ex. 209, pp. 5-6. The visits by the engineer refer to Tom Riley, who inspected the Lebanon and Lancaster sites in October 1991 on behalf of TBN. Tr. 4741-4742. When George Gardner reviewed the applications, he accepted the statement because David Gardner and counsel had worked on the application and the statement referred to David Gardner's job responsibility. Glendale Ex. 208, p. 5. George Gardner mistakenly believed that the reference in the extension applications to an engineer was to Greg Daly, the original site engineer employed when Raystay applied for the construction permit. Tr. 5361, 5340-5341.

"Raystay has undertaken research in an effort to determine the programming that would be offered on the station. It has had discussions with program suppliers to determine what program could be available for broadcast on the station."

241. George Gardner had had discussions with program suppliers at the LPTV conventions he attended concerning programming that could be used on the Lancaster and Lebanon stations. Glendale Ex. 208, p. 5. He had discussions with Video Jukebox Network concerning use of their programming at the LPTV convention in the fall of 1990, over the telephone, and at a cable convention in May or June of 1991. *Id.* George Gardner abandoned the concept because it would have required the purchase of equipment that was not affordable. Tr. 5268. George Gardner also talked to a program supplier named RFD. *Id.* At the fall 1990 LPTV convention, he worked the floor to find out what programmers might be interested in working with Raystay. *Id.*

242. In late 1990 and early 1991, while Etsell was developing his programming concept, Etsell had discussions with George Strimmel, Harry Brooks, and Joe Sans about forming a joint venture to purchase programming and to package it to other LPTV stations. TBF Ex. 265, pp. 61-62. David Gardner had discussions with program suppliers from 1990 until the permits were turned in. Tr. 4833, 4885, 4888. These discussions related to both TV40 and programming for the Lancaster and Lebanon construction permits. Glendale Ex. 209, p. 6, Tr. 4833. Etsell and David Gardner discussed what types of programming could make the Lancaster and Lebanon stations viable, and Etsell asked David Gardner to talk to program suppliers. Glendale Ex. 209, p. 6, Tr. 4884-4885. Raystay looked at home shopping, music video, nostalgia old movies, and news services. Tr. 4887-4888.

"It has also had continuing negotiations with local cable television franchises to ascertain what type of programming would enable the station to be carried on local cable systems."

243. Etsell had a meeting at some point before February 12, 1991 with the board of directors of Cable Adnet. TBF Ex. 265, pp. 47-48. The board consisted of principals of the major cable companies in the area. TBF Ex. 265, p. 44. Prior to that meeting, Etsell talked to Doug Keppler, the President of Cable Adnet. *Id.* After the board meeting, Etsell had additional meetings with senior members of the cable companies. TBF Ex. 265, p. 49. He met with John Scott of ATC, which operated cable systems in Lebanon, Reading, and other small systems in the area. TBF Ex. 265, pp. 45, 52. Etsell also met with Harry Brooks of Suburban Cable, which operated systems in Lancaster and Chester County, as well as Jim Munchel of Susquehanna Broadcasting. TBF Ex. 265, pp. 44, 52. He also met with Hank Lockheart of Sammons Communications. TBF Ex. 265, p. 53. Etsell had no specific recollection of when these meetings occurred in late 1990 and early 1991. TBF Ex. 265, pp. 55-56.

244. George Gardner attended meetings occasionally with cable operators where he discussed with them some of the problems with Etsell's concept. He tried to assure the cable operators that the problems could be resolved. Tr. 5265. He considered the discussions to be a continuing effort. *Id.*

245. David Gardner had discussions with Ron Amick of the Elizabethtown/Marietta cable system, which was within the Lancaster service area. Tr. 4815. David Gardner would meet Amick at the Atlantic Cable Show and at Pennsylvania Cable Television Association meetings in Harrisburg, including one in January 1992. *Id.*, Tr. 4926-4927. He would ask Amick about the possibility of carriage. Tr. 4815.

246. Etsell recalled that around the end of the first quarter of 1991, George Gardner asked him to devote all of his time to the GH Cable properties. TBF Ex. 265, pp. 65-67. George Gardner recalled that there was a suspension of activity on Etsell's business plan once an agreement was reached with Quality Family Companies (Quality) in May 1991. Tr. 5318-5319, see TBF Exs. 212-223.³⁶ George Gardner never abandoned the basic business plan. Tr. 5318. George Gardner feels certain that he reassigned Etsell to work on the business plan after the Quality Family deal collapsed. Tr. 5321. Etsell had a continuing charge to develop the permits. Tr. 5323-5324. Sandifer recalls having a number of discussions with Etsell in 1991 and 1992 concerning the interests of cable operators in the permits. Tr. 4990-4991. Sandifer also recalls Etsell telling him he had discussions with cable operators at the Atlantic City Cable Show in October 1991. Tr. 5121-5122. David Gardner understood from his discussions with Etsell that Etsell was still discussing the LPTV permits with cable operators in 1991 and 1992. Tr. 4822-4823, 4931-4933. Etsell initially recalled that his "direct involvement" with LPTV project ended around the end of the first quarter of 1991. TBF Ex. 265, p. 66. After that time, he was still involved in management discussions concerning the LPTV permits. TBF Ex. 265, pp. 66-67. Later, he testified that while he did not specifically recall having any further discussions with cable operators concerning the LPTV permits:

I have a relationship with these people on a regular basis and it is quite possible that I entered into a brief discussion with them at some associated meeting which I don't recall.

TBF Ex. 265, p. 108.

Preparation of the July 1992 Extension Applications

247. By July 1992, Raystay had not started any construction on the Lancaster or Lebanon construction permits. Tr. 5280. In June of 1992, David Gardner and Schauble discussed filing applications for additional extensions of the Lancaster and Lebanon construction permits. Glendale Ex. 209, p. 7. On June 29, 1992, Schauble wrote David Gardner. TBF Ex. 249. Schauble asked in the letter if Raystay had done additional planning in working to get the stations on the air. *Id.* He then wrote that he would modify the exhibits if there were new such facts, and that otherwise, "we will use the same exhibit." *Id.* In late June of 1992, they discussed what actions had been taken with respect to the permits. David Gardner does not recall the specifics of the conversation, although he generally recalls informing Schauble that Raystay was continuing to do what it had done previously, but that no additional measures were being taken. Schauble informed David Gardner that he believed the same Exhibit 1 that was used in the December 1991 extension applications should be used in the next set of extension applications. David Gardner accepted his advice. Glendale Ex. 209, pp. 7-8.

248. On June 30, 1992, Schauble sent David Gardner four applications to extend the Lancaster and Lebanon construction permits. TBF Ex. 250. David Gardner reviewed the applications and believed the statements made in these applications were accurate. Glendale Ex. 209, p. 8. He was relying on Schauble to ensure that the applications were complete, and he did not see any statements missing from the applications which he thought belonged in the applications. *Id.* Sandifer did not review these applications because he was on vacation. Tr. 5039-5040, Glendale Ex. 208, p. 6. David Gardner sent the applications directly to George Gardner. Tr. 5288. When George Gardner signed the second set of extension applications, he had the knowledge he had when he signed the first set of extension applications. Glendale Ex. 208, p. 6. He still believed the statements contained in Exhibit 1 were accurate, so he signed all four applications. *Id.* George Gardner did not realize in July 1992 that Exhibit 1 was the same as that filed with the December 1991 applications. Tr. 5284-5285.

249. George Gardner signed the second set of extension applications on July 7, 1992. TBF Ex. 251, pp. 2, 6, 10, 14. The four applications were filed with the Commission on July 9, 1992. TBF Ex. 251, pp. 1, 5, 9, 13. The Exhibit 1 used in each of the second set of extension applications was the same Exhibit 1 used in each of the first set of extension applications. *Compare* TBF Exs. 245 and 251. The Commission granted those applications on September 23, 1992. TBF Ex. 252. There is no evidence that the Commission requested additional information before granting the applications.

³⁶ The agreements provided that Raystay would grant Quality exclusive rights to air programming on the LPTV stations subject to Raystay's authority over the operation of the station. In turn, Quality agreed to lease or purchase all equipment necessary to make the stations operational and to make specified

monthly payments to Raystay. Programming was to begin on August 31, 1991. The Agreements were terminated, however, in August 1991 when Quality defaulted by failing to make required payments.

Raystay's Budgets

250. Raystay has adopted an annual budget for each fiscal year since Sandifer joined the company. Tr. 4992. Raystay never adopted a budget that included funds for constructing the Lebanon or Lancaster stations. Tr. 4996, 5238. Raystay's budgeting is a flexible process. Tr. 5104. Raystay has undertaken construction projects (including the rebuilding of cable systems) that were not provided for in its budget for that fiscal year. Tr. 5104, 5186. According to George Gardner, funds could have been allocated in the budget to provide for construction of the LPTV stations. Tr. 5317. The reason no money was budgeted as of the filing of the extension applications stemmed solely from the fact that no viable business plan had been developed. Tr. 5104-5105.

251. During calendar year 1991, Raystay was 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 business. Tr. 5051-5052.

252. 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, the primary Raystay contact, 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. 5058-5062. 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, 5076-5077. George Gardner did not review either of these drafts. Tr. 5074, 5084. 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. 5086-5087. 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. 5294-5295.

253. Greyhound was never asked to fund the construction of these stations. Tr. 5297. George Gardner understood from conversations with Sandifer that the construction permits could be funded under this loan agreement. Tr. 5296-5297. He understood that Raystay could have sought a waiver from Greyhound to use other funds to construct the stations and that "Raystay was generating sufficient cash flow to have done that easily." Tr. 5339-5340. George Gardner also understood that the permits could be built by him advancing the money, by a joint venture, or by getting funds from UNUM, Raystay's senior lender. Tr. 5297.

254. At Sandifer's request, Section 8.17 of the loan agreement was modified to allow Raystay to transfer the construction permits to an affiliate without requiring Greyhound's prior permission. TBF Ex. 264, p. 20, Tr. 5087-5090. Sandifer requested that change to provide for construction of the LPTV stations once a viable business plan was developed. Tr. 5182-5183.

255. Raystay continued its attempt to develop a viable business plan during and after the negotiation of the Greyhound agreement. Tr. 5090-5091. Raystay looked at many plans and options. Tr. 5091, 5093.

Raystay's negotiations re possible sales of Lancaster and Lebanon construction permits

256. Prior to filing the December 1991 extension applications, Raystay had discussions with three parties concerning a possible sale of one or more of the LPTV construction permits it held. These discussions were with Trinity Broadcasting Network, Robert Shaffner, and Dennis Grolman.

257. Trinity repeatedly sent Raystay letters expressing interest in purchasing the construction permits. TBF Exs. 224 and 225. In late August of 1991, after the agreements with Quality fell through, Sandifer authorized David Gardner to talk with Trinity concerning the possibility of selling TV40 and the permits to Trinity. Tr. 4628-4629, 5005-5006. Raystay made an offer to sell TV40 and the permits to Trinity for \$400,000. TBF Ex. 230. Trinity made a counteroffer to buy TV40 for \$150,000 plus \$5,000 for each construction permit. TBF Ex. 231. George Gardner rejected the counteroffer as inadequate with respect to TV40. Tr. 5223. On November 11, 1991, Trinity sent Raystay agreements and application forms which contemplated a sale of the five permits to Trinity for \$5,000 each. TBF Ex. 233-234, 236-237, Glendale Exs. 227, Appendix A. On December 3, 1991, George Gardner, by inter office memo, instructed Sandifer and David Gardner to discontinue negotiations with Trinity. TBF Ex. 238, Tr. 4671-4672, 5015. The memo stated that it remained "OK to transfer to anyone else you may wish to work with." George Gardner's latter instruction referred only to selling TV40, not the base construction permits. TBF Ex. 238; Tr. 5230, 5283. George Gardner halted negotiations with TBN because he had decided to file an application which would be mutually exclusive with the TBN related application for renewal of license of Station WHFT(TV) Miami, Florida. Tr. 5226.

258. Raystay's original discussions with Shaffner concerned Raystay's interest in acquiring his cable system. Tr. 5235. Beginning around October 1991, the idea of trading TV40 as partial payment for the cable system was discussed. Tr. 5024-5025. In late 1991, there were discussions concerning Shaffner purchasing TV40 and possibly the construction permits. Tr. 5026-5027. These discussions were contingent upon a deal between Shaffner and Sammons going through. Tr. 5027. On October 22, 1991, Sandifer sent Shaffner information on TV40, as well as a listing of Raystay's construction permits and information on the permits and information on the permits' service areas. TBF Ex. 239. In approximately December 1991, Sandifer learned that the Shaffner and Sammons deal had fallen through. Tr. 5027. Shaffner and Raystay had further discussions concerning TV40 and the cable systems in 1992 and 1992. Tr. 5027-5028. Shaffner did not have much interest in the construction permits. Tr. 5232-5233.

259. In March or April 1991, George Gardner received an inquiry from Dennis Grolman expressing interest in one or more of Raystay's permits. TBF Ex. 240, Tr. 5231. George Gardner delegated Sandifer to talk to Grolman. Tr. 5016, 5231. Sandifer and Grolman had a meeting (David Gardner attended at least part of the meeting) where they discussed possible joint ventures, individual development options, and potential purchases of the permits. Tr. 5017-5018. After Raystay signed the agreements with R. L.

Fenstermacher, the owner of Quality, Sandifer contacted Grolman to inform him of that fact. Tr. 5019. Sandifer did not hear again from Grolman until the Quality agreements had been terminated. *Id.* These agreements were terminated in August 1991. TBF Ex. 223. By that time, Grolman's interest had narrowed to the Red Lion permit. Tr. 5019-5020.

260. The only specific evidence in the record of communications re possible sales of the Lancaster and/or Lebanon permits between December 1991 and July 1992 was a letter dated June 12, 1992 from David Gardner to an organization called "LPTV". TBF Ex. 248. David Gardner wrote this letter on his own after seeing an article or advertisement from a company that indicated interest in purchasing unbuilt construction permits. Tr. 4936. George Gardner did not know about the letter at the time it was written. Tr. 5281. He was unaware of any efforts by Raystay to look for buyers of the permits in June of 1992 and never instructed his staff to do so. Tr. 5281-5283. David Gardner did not receive any response to his letter, and he probably forgot about TBF Ex. 248 by the time he and Schauble discussed preparation of the record extension applications. Tr. 4859. Sandifer was not aware of any active negotiations with prospective buyers in July 1992. Tr. 5192.

261. Raystay never made any decision to sell the Lancaster or Lebanon construction permits. Tr. 4946-4947, 5282-5283. Raystay never had any understanding or agreement to sell the Lancaster or Lebanon construction permits. Tr. 4947.

Raystay's intentions in seeking extensions

262. The possibility of selling the construction permits played no role in the decision to file applications to extend the Lancaster and Lebanon construction permits in December 1991 or July 1992. Tr. 5338. To Sandifer's knowledge, Raystay would not have filed applications to extend those construction permits in December 1991 if its intention had been to sell those permits. Tr. 5184. Sandifer so testified because the funds Raystay could have received for selling the permits would be insignificant to Raystay's operations and would not justify the time and administrative costs involved. Tr. 5184-5185, 5189-5191. If Raystay had intended to sell the Lancaster and/or Lebanon construction permits in July 1992, Sandifer would have requested a modification of Section 8.7 of Raystay's pending loan agreement with Greyhound Financial Corporation (Greyhound) to explicitly allow Raystay to sell those permits to a third party. TBF Ex. 264, p. 14, Tr. 5185. He never requested such a modification. Tr. 5185.

263. Raystay applied for the construction permits to put them on the air. Tr. 5277. When the extension applications were filed, George Gardner wanted to find a way to make Etsell's business plan work. *Id.* George Gardner did not abandon Etsell's business plan until he decided to turn the permits in in 1993. Tr. 5317-5318. Sandifer understood that George Gardner was interested in seeing a viable business plan and developing the permits. Tr. 5173. George Gardner was not interested in selling the construction permits unless Raystay sold TV40. Tr. 5278, 5282. Raystay is still the licensee of W40AF. Glendale Ex. 208, p. 2.

Assignment of Red Lion Construction Permit

264. In the spring of 1991, the principal of the assignee, Dennis Grolman, contacted George Gardner and expressed interest in the Red Lion construction permit. TBF Ex. 240,

Glendale Ex. 226 at 1. George Gardner assigned responsibility for the matter to Lee H. Sandifer. *Id.* Sandifer spoke with Grolman in the spring of 1991. Glendale Ex. 228 at 1. After the agreements between Raystay Co. (Raystay) and Quality Family Companies were terminated in August 1991 (*see* TBF Ex. 223), further discussions were held with Grolman. *Id.*

265. By October 3, 1991 Sandifer had discussed with Grolman a range of \$10,000 to \$25,000 as the floor and ceiling prices, respectively, for the sale of the Red Lion construction permit. Tr. 5563. When Sandifer gave that range, he did not know what Raystay's costs were with respect to the Red Lion permit. Tr. 5564.

266. In a telephone conversation on October 10, 1991, Sandifer and Grolman agreed to a sale of the Red Lion permit for \$10,000. Glendale Ex. 228 at 1, TBF Ex. 272 at 2, Tr. 5565. Around that time, George Gardner approved the \$10,000 price. Glendale Ex. 226 at 1, Glendale Ex. 228 at 2, Tr. 5566.

267. The sale and purchase agreement was drafted by communications counsel for the purchaser-assignee, the law firm of Arent, Fox, Kintner, Plotkin & Kahn. Glendale Ex. 228 at 1-2. It included the required provision that the amount of the consideration would not exceed that determined by the Commission to be reimbursement of legitimate and prudent expenses in accord with its rules and regulations. TBF Ex. 275 at 3. Raystay had the option of terminating the transaction if the Commission did not approve the agreed upon price, or electing to go forward with the transaction at a lesser price as approved by the Commission. *Id.*, Glendale Ex. 228 at 2, Tr. 5570-5572.

Development of information concerning reimbursable costs of Raystay

268. On October 8, 1991, Sandifer and Morton Berfield, Glendale's communication counsel, talked about the Commission's limitation on recovery of documented out-of-pocket costs for the transfer of the Red Lion permit, the concept of allocating certain expenses to the Red Lion permit and the need for Cohen & Berfield to work with David Gardner in determining attributable costs. Tr. 5596-5597.

269. Sandifer asked David Gardner to gather information on Raystay's expenses with respect to all five construction permits, i.e., two permits for Lancaster, two permits for Lebanon and the single permit for Red Lion/York. Tr. 5567. In response, David Gardner prepared a handwritten tabulation dated October 17, 1991 listing certain expenses aggregating \$15,464.04. Glendale Ex. 227 at 2, 6, Tr. 5567, 5586. Sandifer understood that the tabulation was a preliminary outline of the costs. Tr. 5589. He believed there were additional legal (and possibly engineering) costs, and he directed David Gardner to contact Berfield to determine additional costs. Glendale Ex. 228 at 4, Tr. 5589-5590, 5594-5595.

270. At about this same time, on October 30, 1991, Trinity offered to pay \$5,000 for each of Raystay's construction permits. Glendale Ex. 227 at 2. Then, between October 30th and November 7th, David Gardner called Berfield and asked him to develop the expenses that could be reimbursed in the event of the sale of all of the permits. *Id.* Berfield was given \$30,000 as an amount for which the five permits might be sold. Glendale Ex. 224 at 1-2. David Gardner testified that the \$30,000 figure would have been a combination of \$10,000 for the possible sale of the Red

Lion permit and \$5,000 each for the possible sale of the other four permits to Trinity. Glendale Ex. 227 at 2-3, TBF Ex. 232.

271. On November 7, 1991, Berfield sent to David Gardner a letter which listed the expenses he had found and stated his opinion that total compensation for all five permits in the amount of \$30,000 could be justified. (TBF Ex. 232).

272. Berfield's letter stated that his firm's records indicated that the legal fees for all five permits totaled \$15,397.03. TBF Ex. 232 at 1. He determined that figure by reviewing his law firm's invoices. Glendale Ex. 224 at 2-5, 15-25. For invoices prepared by him, he referred to the invoice and the available time records of attorneys. For invoices prepared by his partner, Lewis I. Cohen, he referred to the same sources and also asked Cohen about the services performed and how he arrived at the amounts billed.³⁷ When Berfield allocated only a portion of the legal fee on a given invoice to the permits, he determined if any identifiable disbursements related to the permits. He applied the proportionate fee percentage (e.g., 50% of total fees) to the total of all other disbursements for which the precise purposes could not be determined (such as long distance calls, xerox charges and postage). Glendale Ex. 224 at 2.

273. Berfield's letter listed \$7,275 in engineering fees and \$1,092.01 in fees to Telsa for obtaining transmitter sites. TBF Ex. 232 at 1. He obtained these figures from David Gardner. Glendale Ex., 224 at 5.

274. Berfield's letter listed \$1,875 in FCC filing fees. TBF Ex. 232 at 1. He determined that amount from his file copies of the FCC applications. Glendale Ex. 224 at 5.

275. The foregoing itemized expenses totaled \$25,639.04. Berfield testified that it has been his experience that after the initial determination of the principal expenses such as legal, engineering and filing fees, additional expenses can be found in more detailed research regarding such matters as (a) travel expenses, (b) long distance telephone calls, postage and other similar office expenses of the applicant entity, (c) equipment that might be on hand and included in the sale, (d) rental fees or other payments to the owners of transmitter sites, (e) salary payments to company employees who are not principals of the applicant, and the like. Glendale Ex. 24 at 5-6. In fact, when discovery research was subsequently conducted in this proceeding, one item alone, i.e., payments to the consulting engineer, uncovered an additional \$3,000. *Id.*

276. Subsequent to Berfield's letter dated November 7, 1991 and before he went on vacation on December 20, 1991 (probably in late November or the first ten days of December), David Gardner called Berfield and asked him to determine if a sale of the Red Lion construction permit for the sum of \$10,000 could be justified. Glendale Ex. 224 at 6, Tr. 5407. David Gardner also asked Berfield to provide the expense information to him, indicating that he (David Gardner) would submit that information to the Arent-Fox law firm which, as communications counsel for Grolman, was to prepare the assignment application. *Id.*

277. In making an allocation of the costs to the Red Lion permit, Berfield referred to his letter of November 7, 1991, to the invoices of his law firm and to the available attorney time sheets. Tr. 5407-5409. He determined that with one minor exception, all of the work in question related to the five permits in the aggregate and would have been required if only one application had been prepared. Glendale Ex. 224 at 8-9, Tr. 5408. Berfield researched Commission case law concerning the allocation of costs among multiple construction permits. The only case he found on the subject was the *Integrated Communications* decision.³⁸ Tr. 5410, 5413. The applications in that case were customized applications with program percentages and special showings quite different from Raystay's applications. Tr. 5412. Berfield thought the main principle of that case was that a lawyer's good faith apportionment should be credited. *Id.*

278. Berfield relayed his conclusions concerning the allocation of expenses to the Red Lion construction permit to David Gardner in a telephone conversation in late November or December 1991. Glendale Ex. 224 at 7. Berfield said that Raystay could allocate one-half of the total legal fees, one-third of the total engineering fees and the individual FCC application filing fee. Tr. 5413. The resulting dollar figures were: \$7,698 for legal fees, \$2,425 for engineering fees and \$475 for the filing fee, for a total of \$10,498. Glendale Ex. 224 at 7. Berfield briefly mentioned his allocation theory to David Gardner, but he does not think he mentioned the *Integrated* case. Tr. 5413.

The Expense Certification

279. Berfield asked if David Gardner wanted him to write something up, but David Gardner said that Arent-Fox would take care of it. Tr. 5420. Berfield went on vacation on December 20, 1991. Glendale Ex. 224 at 7. At that time, he thought the matter had been taken care of, and he did not include it on the list of pending projects that he gave to Cohen when he left. *Id.* Glendale Ex. 225 at 1, Tr. 5420.

280. On December 30, 1991, Cohen took a telephone call from David Gardner in the absence of Berfield and also in the absence of John Schauble, leaving Cohen the only attorney in the office. Glendale Ex. 225 at 1-2. David Gardner told Cohen that he urgently needed a certification of expenses regarding the Red Lion construction permit to provide to counsel for the assignee. Glendale Ex. 225 at 2. While Cohen had a general familiarity with the fact that Raystay was assigning the permit, he had not been involved in the details. Glendale Ex. 225 at 1. David Gardner provided to Cohen the dollar figures and expenses categories which he said Berfield had given him for such a certification. Glendale Ex. 225 at 2. Cohen has been a law partner of Berfield for 30 years and has known and worked with David Gardner since the 1970's. Based upon that long experience, he believed that the information developed by Berfield was true and that David Gardner had given it to him accurately. Glendale Ex. 225 at 1-2.

281. On the next day, December 31, 1991, Cohen prepared a Certification of Expenses using the information provided by David Gardner, and faxed it to David Gardner. Glendale Ex. 225 at 2. The certification itemized the expenses as follows:

³⁷ Cohen and Berfield have represented George Gardner and entities in which he has or has had an interest since the late 1960's or early 1970's. Glendale Ex. 225 at 1.

³⁸ *Integrated Communications Systems, Inc. of Massachusetts*, 5 RR 2d 735 (Rev. Bd. 1965).

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Legal Fees	\$ 7,698.00
Robert Hoover	
Engineering Fees	2,425.00
FCC Filing Fee	375.00

	\$10,498.00

Glendale Ex. 225 at 3. The foregoing itemization is precisely as developed by Berfield, who reviewed the expense certification and verified this when he returned from vacation to learn that the certification had been drafted by Cohen in his absence. Glendale Ex. 224 at 12-13, Tr. 5420.

282. David Gardner and Sandifer discussed the numbers in the expense certification on January 6, 1992. Tr. 5582. At that point in time, David Gardner had signed the expense certification. *Id.* Prior to signing the application, Sandifer asked David Gardner if he had reviewed the certification of expenses with Cohen & Berfield and if the expenses were supportable to the FCC. Tr. 5575, 5577. David Gardner said yes. Glendale Ex. 228 at 5, Tr. 5577. Sandifer signed the assignor's portion of the assignment application on that date, i.e., January 6, 1992. TBF Ex. 241 at 3. The application was filed by David Tillotson of the Arent-Fox firm on January 14, 1992. TBF Ex. 241.

283. During the period that the Red Lion assignment application was completed and signed, George Gardner was on the west coast on a combined holiday and business trip. Glendale Ex. 226 at 2, Glendale Ex. 228 at 5. He left Pennsylvania on December 28, 1991 and returned to the office on January 13 or 14 1992. *Id.*, Tr. 5610, 5640. He did not see the Red Lion assignment application (including the expense certification) prior to the time it was filed. Tr. 5638-5639. He first saw the assignment application and the expense certification in preparation for these proceedings. Tr. 5616, 5639. If George Gardner had been in the office when the application was to be signed, he would have reviewed and signed the application, as was his custom. Glendale Ex. 226 at 2, Tr. 5613.

284. George Gardner has been informed that the expense categories and amounts on the certification were prepared by Berfield and that Cohen prepared the text of the certificate. He has also been informed that Berfield personally did the work to determine the amounts of expenses shown on the certification. George Gardner testified that he regards the categories of expenses that may be reimbursed under the FCC regulations and the format of the expense certification to be matters within the expertise of Messrs. Berfield and Cohen. They have been George Gardner's communications counsel for over thirty years and they are familiar with his commitment to the FCC to take care that all statements in applications signed by him are accurate. Given these circumstances, George Gardner testified that it was appropriate -- in reliance on Messrs. Berfield and Cohen -- for David Gardner to sign the expense certification and for Sandifer to sign the assignment application. Glendale Ex. 226 at 2-3. Tr. 5614. Raystay and Cohen & Berfield were never notified by the Commission that any additional expense information was needed. Glendale Ex. 224 at 13.

Analysis of the expense allocation

285. Berfield believes the certification of expenses is accurate. Glendale Ex., 224 at 13, Tr. 5416. He testified that there was never any intent on his part to misrepresent facts to the Commission or to conceal any facts from the Commission. Glendale Ex. 224 at 13. This testimony is supported and corroborated by the following analysis of how Berfield determined the amount of allocable expenses and how these figures relate to the work done with respect to Raystay's low power television applications and construction permits.

Legal fees

286. Raystay had total legal fees in the amount of \$15,397.03 with respect to the five unbuilt construction permits. TBF Ex. 232 at 1. Berfield determined that one-half of that total, or \$7,698, constituted expenses that could be reimbursed in connection with the Red Lion permit. Glendale Ex. 224 at 7.³⁹ His rationale for doing so was that, for the most part, the legal work for any one of the permits also related to each of the other permits, so the lion's share of the fees for such work could be allocated to Red Lion or to any other permit that might be the first or only permit assigned. Glendale Ex. 224 at 7-9.

287. Berfield reviewed the invoices to see if any of the services were broken out by individual permit Tr. 5507. With the exception of one minor bill that had a specific reference to Red Lion, none of the bills was broken out in that manner. Glendale Ex. 224 at 25, 16-24. The bill for the initial fee of \$5,200 was for the preparation and filing of the five applications, based upon a fee of \$4,000 for one application and \$300 for each additional application. Glendale Ex. 224 at 7-8, Tr. 5505. This breakdown of that fee was premised upon the fact that there was very little difference in the non-engineering portions of the applications that were prepared by Cohen & Berfield. Glendale Ex. 224 at 7-8. Berfield personally prepared those applications. He prepared the Red Lion application first, and the four Lebanon and Lancaster applications were copied from the Red Lion model. Glendale Ex. 224 at 8. The only changes on the non-engineering portion of the other four applications were the channel numbers, communities of license and site information, i.e., owner of the site, his or her telephone number, etc. *Id.*, compare TBF Ex. 207 at 1-7 with TBF Exs. 203-206 at 1-7.

288. With respect to the balance of the legal fees, virtually all of the amount could have been attributed to Red Lion or to any other individual permit. Glendale Ex. 224 at 9. Amendments of the applications were all identical except for the channel numbers, communities of license and application file numbers. Glendale Ex. 224 at 8. The presentations to the Commission, and Cohen's consultations with the Commission's staff, regarding George Gardner's good character and a compliance program for operating stations were activities that were needed in order to secure a grant of the pending low power television applications. *Id.* These were the only applications then pending before the Commission in which George Gardner had an interest and therefore were the only vehicle available for him to make these presentations. *Ibid* at 4. These presentations applied identically to all five applications. *Ibid* at 8. The same showings and conferences were re-

³⁹ Berfield did not parse out 50% of each individual bill for

legal services, rather, he took 50% of the total figure. Tr. 5508.

quired whether there was only one application or five applications. Tr. 5519. The initial work in establishing a compliance program for Raystay's operating low power television station at Dillsburg, Pennsylvania, TV40, was also a requirement needed in order to secure a grant of the pending low power television applications and to help prepare those prospective stations for commencement of operations. Again, that work applied identically to all five applications. Glendale Ex. 224 at 8.

289. Under all of the foregoing circumstances, Berfield testified that he could have allocated up to 90% of the total legal fees to the Red Lion permit, Tr. 5516, 5518-5519, 55242-5525, 5527-5528; that he had been conservative in allocating only 50% of the total legal fees. Glendale Ex. 224 at 9, Tr. 5516, 5519, 5525. Berfield's allocation methodology was a reasonable judgment on his part.

Engineering fees

290. Although five low power television applications were filed by Raystay in March 1989, there were only three transmitter site locations, i.e., Red Lion, Lebanon and Lancaster, since the two applications for Lebanon were for the same site and the two applications for Lancaster were for the same site. Glendale Ex. 224 at 9-10. When Berfield allocated engineering fees, he had a dollar figure of \$7,275 given to him over the phone by David Gardner. Glendale Ex. 224 at 9. Berfield did not have a copy of the invoice from the consulting engineer, Robert Hoover, at that time. *Id.* Berfield had worked with Hoover in the preparation of the applications and in ensuing work relative to securing FAA approval of the antenna proposals. Glendale Ex. 224 at 9-10. He assumed that this dollar figure covered all of Hoover's work including his searches of each of the three antenna sites for frequencies that complied with spacing requirements, notifications to the FAA, preparation of the engineering portions of the applications, and subsequent FAA work relating to an EMI problem. Tr. 5535. Berfield believed that the engineering work was essentially site-related, and since only three sites were involved, he allocated the engineering fee one-third to each site. Glendale Ex. 224 at 9-11. On this basis, and taking into account the factors detailed in ¶¶ 291-296, *infra*, Berfield allocated \$2,425 as the engineering fee for the Red Lion site, i.e., one-third of \$7,275. *Id.*

291. Berfield had worked with David Gardner from the beginning when Raystay first expressed interest in filing for low power television permits. Glendale Ex. 224 at 9-10. Work began in November 1988 in anticipation that the Commission would soon open up a new filing window. Glendale Ex. 224 at 10. The window did open in March 1989 and Raystay then filed the five applications under discussion here. *Id.* Raystay provided Hoover with various transmitter locations in which it had an interest. Hoover performed studies of the available frequencies at these locations, which included Red Lion, Lebanon and Lancaster. Glendale Ex. 224 at 10. The record contains copies of the reports of the three frequency studies by Hoover for Red Lion, Lebanon and Lancaster. Glendale Ex. 224 at 47-75. These are comprehensive documents, with a lengthy and detailed narrative, a tabulation of mileage separations for each available frequency, and a tentative coverage map for each available frequency. *Id.*

292. Berfield was aware that Hoover was responsible for securing FAA clearances, and that such clearances were needed for only three sites, not five. Glendale Ex. 224 at 11, 76-112. He was also aware that in securing FAA clear-

ance for the three sites, particularly the Red Lion site which was the lead site studied by the FAA, there were problems involving electromagnetic interference (EMI) which required more extensive correspondence than normal between Hoover and the FAA. *Id.* When the FAA inquired about EMI at the Red Lion site, Hoover had correspondence and conversations with a transmitter manufacturer concerning the EMI problem. Glendale Ex. 224 at 79. When Hoover wrote a response to the FAA concerning EMI for Red Lion, the response contained a showing from the transmitter vendor. Glendale Ex. 224 at 80, 82. When Hoover later prepared responses to the FAA for Lebanon and Lancaster, he used the same showing. Glendale Ex. 224 at 99, 107.

293. Berfield was also aware that the engineering portions of two applications for the same site involved less work per application than a single application for Red Lion. Glendale Ex. 224 at 10-11. When the engineering portions of the two applications for Lebanon, or the two applications for Lancaster, are compared, the extent of the repetition and duplication is clear.

294. Taking the two applications for Lancaster (TBF Exs. 203 and 204), for example, the engineering sections of FCC Form 346 are identical except for the channel numbers and offsets in Question 2, the length and efficiency of the transmitter lines in Question 4, and certain information in Question 5. *Compare* TBF Exs. 203-204 at 11-12. Section I of the two engineering statements is identical except for two places where the channel numbers are different and one place where there are different ERP figures. *Ibid* at 13. Section IIA of each engineering statement is identical. *Ibid* at 13-14. Section IIB and IIC of the engineering statements are identical except for different figures for centers of radiation, lobe orientation, ERP and efficiency. *Ibid* at 14. The two Sections IID are identical. *Ibid* at 15.

295. Section IIIA of each statement is identical except for differences in channel numbers. TBF Exs. 203-204 at 15. The two Sections IIIB are identical up until the equation $PD' = (1.6) \text{ squared } PD$. *Ibid* at 15-16. The subsequent paragraphs contain the same calculations of the power density for both Channel 23 and Channel 31. *Ibid* at 16-17. The last paragraphs of the respective Sections IIIB are identical except for the transposition of channel numbers. *Ibid* at 17-18. Section IV of the engineering statement is identical except for different channel numbers and offsets. *Ibid* at 18. Figures IA, IB, 2, 3 and 6 of the two statements are identical except for different channel numbers and labels. *Compare* TBF Ex. 203 at 19-22, 24 and TBF Ex. 204 at 19-22, 25. The two Figure 4's are identical except for different main lobe orientations and channel numbers. TBF Exs. 203-204 at 23. The two Figure 5's are different. *Compare* TBF Ex. 203 at 25 and TBF Ex. 204 at 24.

296. Berfield knew that Hoover had done the Red Lion portion of the FCC application first. Glendale Ex. 224 at 27-29, Tr. 5511. Accordingly, the Red Lion engineering section of the application was the lead application in Hoover's work process the same as it had been the lead application in Berfield's work process.

297. Given the entire mix of considerations -- the preparation of three comprehensive frequency studies and reports for the three transmitter locations at Red Lion, Lebanon and Lancaster, the filing and prosecution of FAA clearance requests for those three locations with Red Lion serving as the lead case in dealing with EMI complications applicable to all three locations, the fact that Red Lion was the lead application for the preparation of the engineering

portion of the FCC applications, and the extensive duplication of the engineering portions of two applications for the same site in Lebanon and the two applications for the same site in Lancaster -- Berfield's allocation of one-third of the engineering fee to Red Lion on the premise that approximately one-third of the engineering work related to Red Lion was a reasonable judgment on his part that has now been borne out on the record in this proceeding.

298. As it turns out, in fact Berfield's figure for engineering expenses for the Red Lion permit in the amount of \$2,425 was low by \$100. Tr. 5471-5472. In addition to the \$7,275 figure that David Gardner had given to Berfield as the amount of the engineering costs of the Red Lion, Lebanon and Lancaster applications, Raystay had paid Hoover another \$6,000 for six low power television frequency searches at the rate of \$1,000 per location. Glendale Ex. 224 at 11, 113-116. Such searches were performed for Red Lion, Lebanon, Lancaster and three other locations for which no applications were filed. Glendale Ex. 224 at 11, 114. David Gardner testified that he recalled looking for an invoice reflecting payment over and above the \$7,275, but he could not find such an invoice. Glendale Ex. 227 at 2. Berfield was not aware of the additional \$6,000 payment until it surfaced recently during the discovery phase of this proceeding. Glendale Ex. 224 at 11.

299. Berfield testified (a) that if he had known of the \$6,000 payment for the six frequency searches, \$3,000 of which applied to Red Lion, Lebanon and Lancaster, and (b) if he had seen Hoover's invoice for \$7,275 and had applied Hoover's ostensible breakdown, the allocation would have been \$2,525 in engineering expenses to the Red Lion application. Glendale Ex. 224 at 11-12. This is \$100 more than the amount (\$2,425) that he in fact allocated. The components of that higher figure would have been: \$1,000 for the Red Lion frequency search, \$1,350 for the Red Lion FCC application as billed by Hoover (one fifth of \$7,500 less \$750 discount), and \$175 for the FAA filing for Red Lion as billed by Hoover (one-third of \$525). Glendale Ex. 224 at 12, 117.

FCC filing fee

300. The FCC filing fee in the amount of \$375 was the cost of a single application. It was taken from the law firm's records containing a copy of the Red Lion application as filed. Glendale Ex. 224 at 12.

CONCLUSIONS

Trinity Issues

De facto Control/Abuse of Process

301. The *HDO* requires resolution of two interrelated issues. The first issue to be determined is whether Crouch, TBN or its affiliates exercised *de facto* control over NMTV. The second issue to be resolved is whether NMTV, Crouch, TBN or its affiliates or principals abused the Commission's processes by using NMTV to evade the provisions of Section 73.3555(e) of the Rules and/or by using NMTV to improperly claim minority preferences in LPTV applications. The findings overwhelmingly establish that TBN exercised *de facto* control over NMTV from NMTV's inception and that TBN intentionally used NMTV to abuse the Commission's processes.

302. 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 license 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).

303. 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. 992 (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).

304. 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.

305. On September 9, 1980, the Commission adopted a Notice of Proposed Rulemaking in BC Docket 78-253 which, among other things, proposed giving a preference to low power television and translator applicants with 50% or greater minority ownership and control. Two days later, in anticipation of the proposed changes, TBN founder Paul Crouch conceived of a way to take advantage of the Commission's proposal to award a minority preference.

Translator TV, Inc. (TTI), later named National Minority TV, Inc. (NMTV) was created. TTI/NMTV, claiming a minority preference, would apply for construction permits for new television translators to rebroadcast TBN programming and for low power television stations, while TBN would acquire unbuilt and existing stations. As discussed, *infra*, that policy directive changed when the Commission in 1985 created the minority-controlled exception to its multiple ownership rules, permitting TBN to use NMTV to acquire a 13th and 14th full power TV station. Like TBN, TTI was organized as a nonprofit, non-stock California corporation. TTI's Articles reflect religious purposes which, in Crouch's view, are very similar to that of TBN; namely, to preach the gospel. The Articles do not provide that the corporation was to be minority owned or controlled and the issue of minority control was not discussed with TBN's FCC counsel. TTI was incorporated on September 16, 1980.

306. Thus, from its inception and as discussed *infra*, throughout the existence of TTI/NMTV, Crouch always intended for TTI/NMTV to be nothing more than another vehicle to carry out TBN's mission of spreading the gospel over the airways. Indeed, TTI/NMTV's governing documents reflect a singular goal which all but mimics that of TBN. Crouch's claim that he intended to create a company which would be owned and controlled by minorities is belied by the fact that the company's governing documents make absolutely no reference to forming a company that would be owned, controlled, or operated by minorities. Further, although Crouch claims to have intended for TTI/NMTV to some day become independent of TBN, the record makes clear that TTI/NMTV was conceived as and remains a subsidiary of TBN, 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.

307. The corporate composition of TTI/NMTV provides, perhaps, the best evidence of Crouch's and TBN's intent in creating TTI/NMTV. At its inception and through the hearing Crouch served as president and one of the three directors of TTI/NMTV. Crouch installed Jane Duff, who is Black and a director of TBN as director and vice president of TTI/NMTV. Duff has served in those capacities throughout the history of TTI/NMTV. Duff has also served as "Assistant to the President" of TBN, (Crouch), since 1981, the second highest management position in TBN's hierarchy. Among her many responsibilities, she is responsible for TBN's translator and LPTV applications. Also, when NMTV secured full power TV stations, she was put in charge of those operations. Duff's prominent position in TBN's operations and her many varied and important responsibilities with TBN, described in paragraph 14, *supra*, was not disclosed in the LPTV and TV applications filed by TTI/NMTV and was first revealed involuntarily in 1991. Duff has received no remuneration from TTI/NMTV; her income comes solely from her services for TBN.

308. With respect to the non-TBA members of TTI/NMTV's board of directors, the record reflects that their selections by Crouch were based on two criteria: (a) minority status and (b) demonstrated past loyalty to TBN. Further, each of the four "outside" directors evidenced a

woeful lack of involvement in and knowledge of the affairs of TTI/NMTV. Thus, they failed to qualify as "owners" in any meaningful sense. Even if they had opted to be more active participants, the governance of TTI/NMTV would not have changed. In initially naming himself and fellow TBN director Duff to TTI/NMTV's board and in limiting the number of directors who actually served,⁴⁰ 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 by-laws.

309. Crouch and TBN's complete domination of TTI/NMTV permeates every facet of TTI/NMTV's affairs. From TTI/NMTV's inception, TBN has controlled that company's finances in all material respects. After TTI/NMTV was formed, TBN's paid employees, consultants, and lawyers prepared the company's LPTV applications. TTI/NMTV was never billed for any services connected with those applications. During the initial years of its existence, TTI/NMTV did not maintain a bank account at any financial institution. Rather, the company's finances were maintained by TBN personnel in a TBN account. The financial condition of TTI/NMTV was reflected each year in a TBN financial report which was prepared by accounting firms retained and paid by TBN. TTI/NMTV was never billed for any of these services.

310. During the initial years of TTI/NMTV's existence, TBN conducted telethons during which contributions were solicited from viewers for TTI/NMTV and its projects. TBN employees processed the money and pledges that were received as a result of the telethons, and TBN's accounting personnel determined whether and to what extent TTI/NMTV's account should be credited with any of the money received.

311. For a number of years, TBN accounting personnel debited TTI/NMTV's account for expenses incurred by TBN in connection with TBN's efforts to obtain translator and LPTV stations. Since TTI/NMTV was created for the purpose of obtaining such facilities, the inference that must be drawn is that TBN charged its translator/LPTV-related expenses to the TTI/NMTV account because TBN considered TTI/NMTV to be a mere subordinate vehicle for carrying out TBN's translator/LPTV activities. This practice caused TTI/NMTV's account to reflect an ever increasing negative fund balance which, by 1987, ballooned to more than \$480,000. No one -- not Crouch, Duff, or the company's CFO, Espinoza -- ever questioned the TBN practice of attributing its translator/LPTV debts to TTI/NMTV despite the fact that during much of that time TTI/NMTV was virtually inactive.

312. When TTI/NMTV acquired its first full power television station in Odessa, Texas in 1987, it did so with money from TBN. As it had done with its other owned and operated companies, TBN provided the money to TTI/NMTV without any security, repayment terms, interest, or promissory note. This was consistent with TBN's *modus operandi* for companies whose governing boards -- and finances -- are controlled by Crouch and other TBN personnel. By contrast, companies with autonomous governing boards, whose stations are TBN program affiliates in the

⁴⁰ It is noteworthy that TTI/NMTV's bylaws have always permitted up to ten directors to serve on its governing board.

Notwithstanding, the number never exceeded four and during most of TTI/NMTV's existence, did not go beyond three.

traditional sense, have received loans from TBN that are evidenced by formal written notes which contain all pertinent terms and conditions.

313. TBN's informal method of dispensing money for TTI/NMTV projects continued unabated through 1992. Thus, without any evidence of notes, security, terms, or interest rates, TBN funded the entire construction of TTI/NMTV's Odessa full power television station, the purchase and complete construction of TTI/NMTV's Portland full power television station, and the filing of numerous LPTV construction permit applications. Furthermore, TBN agreed to fund in the same informal manner TTI/NMTV's proposals to purchase (additional full power commercial television stations in Wilmington, Delaware (\$3.6 million); Concord, California (\$5.4 million); and Hammond, Indiana (\$9 million).

314. The financial control that TBN exercised over TTI/NMTV is best illustrated by the events transpiring after the Odessa station was sold to Prime Time, a religious entity which promised to continue airing TBN programming. In fact, neither Crouch, Duff, nor Espinoza, the "outside" director, considered selling the station to anyone who would not continue to operate it as a TBN affiliate. Clearly, the continuation of TBN programming – not return on investment – was the main concern in finding a suitable buyer. No one associated with TTI/NMTV made any effort to determine the fair market value of the Odessa station before it was sold. In fact, although TTI/NMTV was heavily in debt, it agreed to sell the Odessa station to Prime Time for more than \$100,000 below what it cost to construct the facility.

315. The sale of the Odessa station to Prime Time was not a cash deal. Rather, TTI/NMTV took back a note for the entire \$650,000 sales price. When Prime Time subsequently expressed concern that it might go bankrupt if it was not relieved of its debt, TTI/NMTV simply wrote off the entire obligation. There was little, if any, consideration given to modifying the terms of the note in order to make it easier for Prime Time to continue making payments. Of course, the real motivation for cancelling Prime Time's debt was the concern that if Prime Time went bankrupt, TBN might lose an affiliate station in Odessa as well as other TBN affiliate stations that Prime Time then owned.

316. Clearly money was not a concern for TTI/NMTV because it had from TBN what in essence was a bottomless reserve of available funds for projects that furthered TBN's goals. Every existing full power television station that TTI/NMTV acquired or considered acquiring, and every application for a construction permit for a new LPTV or translator station that TTI/NMTV filed with the Commission was in a market that did not yet enjoy over-the-air reception of TBN programming. When it was not in TBN's interest to construct a studio in Odessa capable of originating local programming, the studio was not built. By con-

trast, when it benefitted TBN to have such a studio at TTI/NMTV's Portland, Oregon, station, or to commence construction of a new TTI/NMTV LPTV or translator station, the money and personnel that were needed became immediately available.

317. The evidence also reveals that throughout TTI/NMTV's existence, TBN personnel have performed work at all levels for TTI/NMTV without compensation and, in numerous instances, as part of their TBN duties. Crouch receives a salary from TBN and has always served simultaneously as an officer and director of both TBN and TTI/NMTV. Similarly, Duff has always been a salaried employee of TBN and for a number of years was also an officer and director of TBN while serving as an officer and director of TTI/NMTV. The address for TTI/NMTV's main offices has always been the same as the address for TBN's headquarters. However, TTI/NMTV has never occupied its own offices within the TBN complex. For example, Duff's office at TBN has always served as her office for TTI/NMTV. Duff routinely performed numerous tasks on behalf of TTI/NMTV during her TBN work day, and her salary at TBN was never affected in any way. The work that Duff performed on behalf of TTI/NMTV was, in practicality, simply a part of her routine TBN duties. Duff often drafted correspondence relating exclusively to TTI/NMTV matters using TBN stationery and identifying herself in her capacity as Crouch's assistant at TBN. On numerous occasions, she directed to TTI/NMTV employees in Odessa and Portland the same TBN interoffice memoranda that she directed to TBN's owned and operated stations.⁴¹

318. TBN personnel, consultants and lawyers were routinely utilized, often without cost to TTI/NMTV, to prepare, file, and prosecute TTI/NMTV's LPTV and translator applications before the Commission. TBN personnel performed all accounting activities for TTI/NMTV. TBN personnel performed all payroll activities for TTI/NMTV. When TTI/NMTV contemplated purchasing a full-power television station in Wilmington, Delaware, Crouch dispatched one of TBN's station managers to inspect the facility. Upon his return, the station manager reported his findings to TBN's Chief Engineer, Ben Miller, and to Duff. TTI/NMTV did not compensate TBN for the station manager's activities.

319. Miller supervised the overall construction of TTI/NMTV's full-power television stations in Odessa and Portland. Miller independently authorized numerous purchase orders for equipment and supplies for the Odessa and Portland facilities. He arranged in one instance without charge for the transfer of equipment from a TBN station to a TTI/NMTV station. Miller provided continuing oversight of the operation of the Odessa and Portland stations after they commenced broadcasting. He supervised the engineers at TTI/NMTV's Portland and Odessa stations, communicated with them directly, and in one case recommended a bonus for the work that a TTI/NMTV engineer

⁴¹ According to Trinity, the ultimate question in resolving whether Crouch and/or TBN exercised *de facto* control over NMTV is whether Duff acted independently of Crouch or as his agent when she performed her role as a director of NMTV. Trinity PFCs at p. 440. The Presiding Judge does not agree with Trinity's proposition. Further, Trinity has failed to show Duff was independent. To support the conclusion that Duff was independent, Trinity cites those rare instances where Duff did not agree with Crouch with respect to a matter concerning NMTV's affairs. Trinity PFCs at pp. 440-444. However, given

Duff's continued roles at TBN, it is virtually impossible to conclude that Duff's activities on behalf of NMTV, including the few times Duff opposed Crouch's desires, were not the result of her assessment of what would be in the best interests of TBN. Thus, Duff's purported independence as an NMTV board member does little to support a conclusion that Crouch and/or TBN did not exercise *de facto* control over NMTV since Duff, during the entirety of her tenure as NMTV board member, also had a fiduciary responsibility to TBN.

had performed. Miller provided all of his services to TTI/NMTV without charge. He did not have to bill TTI/NMTV. Miller is a salaried TBN employee who performed many of his TTI/NMTV tasks during his TBN working day. Miller's TBN salary remained unaffected by the work he performed for TTI/NMTV. The work that Ben Miller did for TTI/NMTV was simply part of his TBN job. Crouch's and Duff's claims that Miller was merely a "consultant" to TTI/NMTV simply cannot be credited. Miller used a number of different titles depending upon the particular TBN-related company for which he was working at the moment. Miller's use of those titles, however, constituted nothing more than a contrivance. Miller and a host of other TBN employees performed work for TTI/NMTV as part of their jobs at TBN because TTI/NMTV was considered part of TBN.

320. As discussed above, TTI/NMTV's purpose at its inception was to acquire translator stations and LPTV stations that would serve as additional outlets for TBN programming. The evidence reveals that every one of TTI/NMTV's LPTV and translator stations have always broadcast TBN programming. During the relatively brief time that TTI/NMTV held the license for the Odessa station, nothing but TBN programming was broadcast. The record evidence further demonstrates that, with the exception of some locally originated programming, the Portland station has also broadcast only TBN programming. Indeed, it was understood by everyone associated with TTI/NMTV that when TTI/NMTV applied to the Commission for a construction permit or to acquire an existing station TBN would be the source of all network programming. No one even considered broadcasting programs provided by any other religious network. TTI/NMTV was created by Crouch who founded TBN. He controlled TTI/NMTV's affairs just as much as he controlled those of TBN. Under the circumstances, it would have been virtually impossible for a TTI/NMTV station to broadcast anything other than TBN programming. TTI/NMTV was, in every material respect, a TBN owned and operated company.

321. It is also significant that TBN held out to the public that TTI/NMTV was nothing more than an operating division of TBN. Thus, in numerous "Praise The Lord" newsletters, TBN's monthly publication, it was represented in no uncertain terms that Espinoza, then host of the TBN program, "Felicidad," and a director of TTI/NMTV, was "a board member of our Satellite Division." The significance of this representation cannot be understated. TBN did not have a "Satellite Division" as such, and the only entity of which Espinoza was a board member was TTI/NMTV. In stating that Espinoza was a member of TBN's Satellite Division, TBN was referring to TTI/NMTV, which Crouch had created for the purpose of acquiring translator stations and rebroadcasting satellite-delivered TBN programming. TTI/NMTV may have been recognized under state law to be a sovereign corporate entity because it had its own articles of incorporation and bylaws, but Crouch plainly regarded TTI/NMTV as an operating branch of TBN. That was Crouch's frame of mind; that is how TBN characterized TTI/NMTV to the public in its newsletters; and that is how, in practice, Crouch and others at TBN treated TTI/NMTV.

322. TBN's communications counsel also treated TTI/NMTV as a TBN subsidiary rather than an independent corporate entity. This is most evident in the manner in which the law firm of May & Dunne billed for its services. During the early years of TTI/NMTV's existence, when May & Dunne performed work on behalf of the

company, the law firm did not bill TTI/NMTV at all for its services. Commencing with TTI/NMTV's acquisition of the Odessa station, May & Dunne included a line item reference for services rendered to TTI/NMTV in TBN's bills. The practice of sending one consolidated invoice to TBN for services rendered to TTI/NMTV, TBN, and other Trinity-named companies continued unabated for some five years. Clearly, May & Dunne's billing practice is a reflection of how the law firm viewed TTI/NMTV's relationship to TBN. The firm billed and expected payment from only TBN. It is yet another indication of the extent to which the two companies were in fact treated as inextricable.

323. In sum, the only conclusion that can logically be drawn is that from its inception and throughout its history TBN and Crouch, aided and abetted by Duff, has exercised *de facto* control over all facets of TTI/NMTV's business. In fact, it is difficult, if not impossible, to distinguish one company from the other. Crouch's invention of TTI/NMTV in 1980 provided the vehicle for TBN's abuse of the Commission's processes.

324. Abuse of process is a broad concept that includes use of a Commission process to achieve a result that the process was not intended to achieve or use of that process to subvert the purpose the process was intended to achieve. See *Broadcast Renewal Applicants*, 3 FCC Rcd 5179, 5199 n.2 (1988). The Commission has held that it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party. *Arnold L. Chase*, 5 FCC Rcd 1642, 1643 (1990). Abuse of process "is not an easy matter to prove." *WWOR-TV, Inc.*, 7 FCC Rcd 636, 638 (1992), quoting *Memorandum Opinion and Order in BC Docket No. 81-472*, 5 FCC Rcd 39901, 3903 ¶ 8 (1990). In adjudicatory proceedings, the conclusion that an entity has abused the Commission's processes must be based on more than a generalized concern that such abuse may be occurring. Such a conclusion requires a specific finding, supported by the record, of abusive intent. See *Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1702 n., 10 (1992), citing *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *RKO General, Inc.*, 4 FCC Rcd 4072, 4073 (1989). Crouch's invention of TTI/NMTV and his use of that entity to circumvent the Commission's rules and improperly claim minority preferences coupled with its concealment of the nature and extent of its relationship with TBN manifestly demonstrates abusive intent.

325. As discussed more fully below, the record evidence reveals that NMTV, Crouch and TBN abused the Commission's processes three times by using NMTV to evade, and attempting to evade, the limitations on cognizable interests that can be held by one person imposed by the Commission's multiple ownership rules. Also, abuse occurred when TTI (and later, NMTV) claimed entitlements to minority preferences in its translator and LPTV applications.

326. In 1983, the Commission adopted the practice of awarding a minority preference in an LPTV lottery. A party was entitled to a minority preference where more than 50% of an entity was controlled by minorities. The Commission provided therein that for purposes of determining entitlement to a minority preference, non-stock corporations, such as TBN and TTI/NMTV, would be judged as to minority status on the basis of the composition of the board. TBN could not claim a minority preference; its 3 person board contained only one minority member,

Duff.⁴² Instead, TBN utilized TTI/NMTV to claim minority preferences in several LPTV applications. Such minority preference claim was improper since TTI/NMTV was not independent. Rather, as previously concluded, TTI/NMTV was completely controlled by TBN. The reality of the TBN and TTI/NMTV relationship was concealed in the LPTV applications filed with the Commission. It is concluded that in improperly claiming minority preferences and concealing pertinent facts from the Commission, TBN and Crouch committed serious willful and repeated violations of the Communications Act and its Rules.⁴³

327. In 1985, the Commission amended its multiple ownership rules to increase from seven to twelve the member of full power commercial television stations in which a party could hold a cognizable interest. The Commission also created an exception to the so-called "Rule of 12's" by permitting a party to hold a cognizable interest in up to fourteen full power commercial television stations, provided at least two of the stations were controlled by minorities. *Amendment of Section 73.3555*, 100 FCC 2d 74, 94 (1985).⁴⁴

328. In establishing the exception to the "Rule of 12's," it is clear that the Commission never intended to abandon its practice of considering both *de jure* and *de facto* control in determining compliance with the multiple ownership rules. Indeed, it would be inimical to the stated goal of promoting minority participation in the broadcast industry

if, in assessing compliance with §73.3555, the Commission did not require minority "owners" of a broadcast station to also control the business and activities of the station.⁴⁵ Thus, any interpretation of §73.3555 which omits consideration of actual working control is unreasonable on its face. Such an interpretation ignores past Commission practice and precedent; it disregards the stated goal underlying the minority-controlled exception to the multiple ownership rules; and it contravenes Note 1 to §73.3555. Thus, it would be abusive for a party to acquire or attempt to acquire cognizable interests in more than 12 stations if those additional interests were not under both *de jure* and *de facto* control of minorities.⁴⁶

329. The findings establish that between February 1987 and December 1991, Crouch, by virtue of his being an officer and director of TBN, held cognizable interests in 12 commercial television stations. During that period, none of TBN's three directors was a minority. On three different occasions -- February 1987 (the Odessa application), December 1987 (the Portland application), and March 1991 (the Wilmington application) -- NMTV, TBN's alter ego, asked the Commission to grant an attributable interest in a 13th or 14th full power commercial television station. NMTV justified its requests on behalf of Crouch by falsely claiming it was minority controlled, and concealing in each of the applications the nature and extent of its relationship with TBN.⁴⁷ Consequently, it must be concluded that

⁴² In the summer of 1984, Duff resigned from TBN's board and the boards of the TBN companies holding full power television stations in the United States. Duff remained on the boards of TTI/NMTV, Community Educational, Inc., and TBN's foreign broadcast corporations. Notwithstanding her resignation as a TBN director, Duff continued to attend TBN board meetings in her capacity as assistant to the president.

⁴³ The Bureau argues TTI/NMTV did not abuse the Commission's processes in claiming a minority preference in LPTV applications. According to the Bureau, "in developing its minority preference scheme, the Commission emphasized minority ownership' over minority control." (Bureau Conclusions, Para. 304). The Bureau cites in support of this proposition the Commission's determination that nonstock corporations (as well as licensees operated by Commissions, boards or other governmental bodies) should be judged as to minority status on the basis of the composition of the board. *Random Selection Lotteries*, 93 FCC 2d 952 at 977 (1983). The Bureau's contention is rejected. The language relied on by the Bureau merely defines what constitutes the control of a non-profit corporation as opposed to a for-profit corporation. In making its argument, the Bureau ignores the fact that the Commission's preference scheme specifically provides that preference will be available for "(a) applicants more than 50% controlled by minorities (a 2: 1 preference). 93 FCC 2d at 953. The Commission's emphasis on control and not ownership is consistent with well established Commission precedent interpreting Section 310(b) of the Act. See paragraphs 302-303, *supra*.

⁴⁴ In creating a minority control exception, the Commission affirmed its belief that policies such as tax certificates, distressed sales benefits and lottery preferences, as opposed to the multiple ownership rules, should serve as the primary mechanisms to promote minority ownership in communications. Nevertheless, it recognized that the multiple ownership rules might "in some circumstances, play a role in fostering minority ownership." *Id.*, at 94.

⁴⁵ A non-stock corporation such as TTI/NMTV does not have "owners" in the traditional sense but simply has a board of directors whose members hold certain specific rights granted by the company's articles of incorporation and bylaws.

⁴⁶ Trinity seeks to excuse its domination of TTI/NMTV's affairs on the ground that the Commission's exception to the "Rule of 12's" permits "joint ventures" between established broadcasters and minorities whereby such established broadcasters would be primarily responsible for station operations pending acquisition by minorities of sufficient expertise to operate the station themselves. Trinity's position is without merit. It is true that an Advisory Committee created by the Commission to explore means of increasing minority ownership made various recommendations. Such recommendations included (6) permitting broadcasting entrepreneurs to acquire equity interests in minority-controlled entities or as an alternative, a form of "joint venturing" whereby a multiple owner would be allowed to acquire the additional prohibited property, provided he assisted a minority in the financing of another comparable venture. *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 852 and note 17 (1982). However, overlooked by Trinity, the Commission did not adopt a proposal permitting joint venturing in any form. *Id.*, at 853. Further, no such proposal was incorporated in or even discussed in the proceeding adopting the minority control exception to the "Rule of 12's." See *Amendment of Section 73.3555*, 100 FCC 2d 74, 94-95, 97-98 (1985). Moreover, Trinity's argument is patently inconsistent with Note 1 to Section 73.3555 which states the word *control* "is not limited to majority stock ownership, but includes actual working control in whatever manner exercised." Thus, it is clear, contrary to Trinity's assertion, that the Commission has never adopted any policy reflecting an intent or expectation that a non-minority principal would assume a dominant position in a minority-controlled licensee.

⁴⁷ Trinity claims that, during the five years prior to the Borowicz petition to deny, it had filed over 80 documents with the Commission that showed Duff's association with TBN. Trinity PFCs at pp. 460-461. Even if one accepts the argument that it is incumbent on the Commission to review as many as 80 prior filings before finding an applicant to have lacked candor, the various filings of TBN and NMTV do not begin to give a full and truthful picture of the extent of their relationship. The bulk of the documents reveal no more than that a person named Mrs. Jane Duff, or Jane Duff, will be receiving copies of

NMTV, Crouch and TBN abused the Commission's processes by using the applications to garner Crouch and TBN television station interests to which they were not entitled.

330. It is further concluded that TBN's and Crouch's misconduct was intentional. Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists, as is the case here. *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4198 n.41 (1993), citing *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir., 1985); *Scott & Davis Enterprise, Inc.*, 88 FCC 2d 1090, 1100 (Rev. Bd. 1982). The findings establish that TBN and Crouch created a "sham" corporation to take advantage of the minority preference. Although TTI/NMTV was given the trappings of a "minority controlled" corporation, the reality of the TBN and TTI/NMTV relationship was well known to TBN and Crouch. Crouch's motive was clear -- to acquire and utilize all available communications media to carry out TBN's mission. The Commission's decision to award minority preferences to LPTV applicants and to create a minority controlled exception to the multiple ownership rules provided a golden opportunity to Crouch and TBN.

331. The repeated concealment of material facts concerning the TTI/NMTV relationship with TBN cannot be sluffed off as an unintentional mistake. It was intentional deception since disclosure would have thwarted TBN's and Crouch's ambitions. TBN and Crouch are guilty of willful misrepresentations in falsely representing in application that TTI/NMTV was under minority control. It is also guilty of lack of candor in concealing facts concerning the true identity of TTI/NMTV. The Commission's "scheme of regulation rests on the assumption that applicants will supply the Commission with accurate information." *Character Policy Statement*, 102 FCC 2d 1179, 1210 (1986). The "trait of truthfulness" is one of the two key elements of character necessary to operate a broadcast station in the public interest." The other is reliability in complying with the Communications Act and Commission requirements. *Id.* at 1209-1210. Intentional deceptions of the Commission by providing either false information (misrepresentation) or incomplete and misleading information (lack of candor) are viewed as "serious breaches of trust." *Id.* at 1211. Where inaccurate information results from an intention to deceive, as in this case, total disqualification is warranted. *Standard Broadcasting, Inc.*, 7 FCC Rad 8571 (Rev., Bd. 1992); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Sea Island Broad-*

casting Corp. of S.C. v. FCC, 627 F.2d 240 (D.C. Cir. 1980); *Chaconas v. FCC*, 486 F.2d 1314 (D.C. Cir., 1973); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

332. Crouch seeks to mitigate his abuse of the Commission's processes by contending he relied on his communications counsel, Colby May, who advised that NMTV qualified as a minority controlled entity. The findings demonstrate, however, that the blame for the creation of the "sham" corporation, TTI/NMTV, and its subsequent use as a vehicle to abuse the Commission's processes rests squarely with Crouch. Initially, the findings establish that TTI/NMTV was the brainchild of Crouch to take advantage of the minority preference. Significantly, the issue of minority control was not discussed with FCC counsel at the time of its creation. With respect to the improper claim of the low power preferences, it is clear that Crouch always intended to claim such preferences, well prior to any advice from Colby May. Further, Crouch's alleged reliance on his counsel is belied by the fact that Crouch admitted that he understood NMTV's entitlement to the minority exception to the 12 station ownership limit was uncertain (see para. 65). Crouch's testimony also establishes that he knew how to resolve such uncertainty -- by putting all of the facts before the Commission and obtaining a ruling. Given this knowledge, no legitimate claim can be made that Crouch merely relied on counsel. Of course, what Crouch knew should have been done was not in fact done. The applications filed by NMTV are on their face models of nondisclosure. The only conclusions that can be drawn is that Crouch voluntarily chose to hide behind an opinion of counsel⁴⁸ that allowed him to do what he intended to do, notwithstanding his knowledge that the proper course was to disclose all the facts to the Commission and await its rulings.⁴⁹ In this connection, Crouch is an experienced broadcaster and sophisticated in the business and management aspects of his ministry. An experienced broadcaster with significant business experience has a lesser basis for claiming reliance on counsel. See *RKO General, Inc.*, (KFRC), 5 FCC Rcd 3222, 3224 (1990); *Algreg Cellular Engineering*, 9 FCC Rcd 5098, 5142 (Rev. 1994). Especially in light of Crouch's recognition of the need to make full disclosure to the Commission as the only means of ensuring compliance with the Commission's Rules, there is no basis for excusing Crouch's repeated and willful misconduct based on a plea that Crouch blindly relied upon advice of counsel.⁵⁰

TBN applications or had witnessed signing of a purchase agreement for a television translator construction permit or station. TBF Ex. 122, pp. 1, 22-24, 40, 48-49, 51-56, 73, 80-82, 84, 88-112, 129, 138-139, 141-143, 145-152, 165-169, 188, 199-206, 224, 234-249. With respect to the KTBN-TV renewal application, which was filed on July 29, 1988, the document reveals only that Jane Duff, the "Administrative Assistant to the President" is the person primarily responsible for the station's EEO program. TBF Ex. 122, pp. 158, 160. Only with respect to the ownership report for CET filed November 13, 1989, is it revealed that Jane Duff, a businesswoman, is a director of both CET and NMTV, and an employee of TBN. TBF Ex. 122, pp. 252-255. Prior to the opposition to Borowicz' petition to deny, NMTV had made no such disclosure about Duff. Interestingly, the CET ownership report asserts that CET is not "formally" under the control of any other organization or corporation, although several of the corporation's officers and directors are officers and directors of other broadcast licensees. TBF Ex. 122,

pp. 253-254. In this connection, it required two Commission letters of inquiry before sufficient facts were forthcoming to permit even a preliminary analysis of the TBN/NMTV relationship.

⁴⁸ Crouch's claimed reliance on his counsel is also dubious considering the fact that May's advice was provided orally and contained no analysis of the pertinent rule or its history.

⁴⁹ As discussed in finding 65, Crouch sought to backtrack from his testimony after he became aware through further questioning of the adverse inferences that would arise. Crouch's attempt to revise his testimony has been found not to be credible.

⁵⁰ In *International Panorama TV, Inc.*, (KTBN-TV), FCC 83D-4 (released January 25, 1983), Crouch was found to have abdicated responsibility to assure himself that all representations in a renewal application were true and correct. However, as reflected in this record, his previous misconduct has had no deterrent effect on Crouch and TBN.

333. The issue to be resolved is whether TBF is qualified to remain a Commission licensee. There is no meaningful distinction between TBF and TBN. The two corporations have the same boards of directors; the two corporations are in fact controlled by the same principals; and TBF is treated by TBN as an owned and operated company. Thus, TBN's and Crouch's FCC-related misconduct has a direct bearing on TBF's qualifications. It is concluded, in light of the egregious misconduct discussed in the previous paragraphs, that TBF's disqualification and the loss of its license is mandated.⁵¹

334. Paragraph 52 of the *HDO* requires the determination of whether an order for forfeiture in an amount not to exceed \$250,000 should issue against TBF, TBN and/or NMTV for willful and/or repeated violations of Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), and/or Section 73.3555(e) of the Commission's Rules, 47 C.F.R. § 73.3555(e), which occurred or continued within the applicable statute of limitations. Imposition of a forfeiture is permissible since willful and repeated violations of the Act and Rules by TBN and Crouch has been demonstrated. However, imposition of a forfeiture is not recommended. The loss of TBF's license is a sufficient sanction. Further, the ultimate source of TBN's assets are contributions from members of the general public. Thus, it would appear that a forfeiture would not directly impact the actual wrongdoers in this case, but would ultimately be paid by innocent members of the public.

Glendale Issues

335. The first issue added against Glendale seeks a determination whether Raystay made misrepresentations or lacked candor in applications seeking extensions of time to construct low power television stations (LPTV). The findings establish that while Raystay may have been guilty of imprecision and exaggeration in its assertions, there is no evidence permitting a conclusion that Raystay or Glendale principal George Gardner intended to deceive the Commission. The issue is therefore, resolved, in favor of Glendale.

336. A misrepresentation is a false statement of fact made with an intent to deceive the Commission. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (1983). Lack of candor is a concealment, evasion or other failure to be fully informative accompanied by an intent to deceive the Commission. *Id.* A necessary and essential element of both misrepresentation and lack of candor is intent to deceive. The mere existence of a mistake in an application, without any evidence that the licensee meant to deceive the Commission, does not equal misrepresentation. *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700, 67 RR 2d 1159, 1166 (Rev. Bd. 1990), quoting from *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 (1988). Similarly "[c]arelessness, exaggeration or slipshoddiness... do not constitute misrepresentation."

F.B.C., Inc., 3 FCC Rcd 4595, 4597, 65 RR 2d 263, 267 (1988). Additionally, the mere failure to provide a more complete explanation does not constitute a lack of candor. *Cannon Communications Corp.*, *supra*, 5 FCC Rcd at 2705 n.18, 67 RR 2d at 1166 n.18.

337. The issue relates to the conduct of four persons affiliated with Raystay: David Gardner (who provides management services to Raystay as an employee of Waymaker Co.), Lee Sandifer (Raystay's Vice President and Chief Financial Officer), Harold Etsell (a former Vice President of Raystay) and George Gardner (Raystay's President and sole voting stockholder). The first three individuals have no relationship to Glendale, while George Gardner is the President and majority stockholder of Glendale. Any misconduct by David Gardner, Sandifer, or Etsell would have no bearing on Glendale's qualifications because they are not stockholders, directors, officers or employee of Glendale. Thus, any disqualification of Glendale rests entirely on whether George Gardner acted with an intent to deceive the Commission.

338. In July 1990, Raystay acquired five LPTV construction permits. Two permits specified Lancaster, PA as the community of license. The community of license for two other permits was Lebanon, PA, and the fifth permit was for Red Lion, Pa. Two extension applications were filed for the Lexington and Lebanon permits - one on December 20, 1991, and one on July 9, 1992. Each of the eight extension applications used the same Exhibit 1 prepared by John Schauble of Cohen and Berfield based upon a telephone conversation he had with David Gardner in December 1991.

339. Under Section 73.3534(b) of the Commission's rules, the most important factor in evaluating an extension request is the status of construction.⁵² Each of the extension applications unambiguously made clear that construction had not started. Raystay forthrightly admitted that equipment had not been ordered or delivered. Clearly, if Raystay had intended to deceive the Commission concerning the status of construction, it would not have made this admission putting in peril the grant of its extension request. The exhibit then went on to describe what steps had been taken toward building the stations. With respect to most of these statements, there is no real dispute as to their accuracy. For instance, Raystay informed the Commission that it had discussions with equipment suppliers concerning equipment that could be used at the station, and the record fully supports that contention. George Gardner (and to a lesser extent, David Gardner) had a variety of discussions with equipment suppliers. The findings fully support Raystay's statement that its representative (David Gardner) and an engineer (Tom Riley) visited the site and looked at such matters as the placement of equipment and the availability of electric power.⁵³ David Gardner visited each site twice while the permits were outstanding.

⁵¹ In light of TBF's disqualification, it is not necessary to consider TBF's renewal expectancy showing. It is well established that only basically qualified applicants are entitled to comparative consideration. *Louis Adelman*, 28 FCC 432 (1960), *aff'd sub nom, Guinan, et al v. FCC*, 297 F.2d 782 (D.C. Cir. 1961).

⁵² Section 73.3534(b)(2) provides, in pertinent part, that applications for extension of time to construct broadcast stations will be granted only if "[s]ubstantial progress has been made,

i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion."

⁵³ For these purposes, it is irrelevant that Riley was not Raystay's engineer. What is significant is that David Gardner had the benefit of Riley's evaluation which could be used by Raystay. While Exhibit 1 said that the representative was affiliated with Raystay, no such claim was made for the engineer.

340. The findings also clearly supports Raystay's statement that it undertook research to find programming for the stations. Raystay looked at a variety of programming formats, including everything from home shopping to music video to nostalgia to old movies to news channels. Raystay's concept was to find programming that would be attractive to cable subscribers and would convince cable operators to carry the stations. George Gardner, David Gardner, Etsell, and Sandifer⁵⁴ all talked to program suppliers in a search for acceptable programming. Etsell had extensive discussions with cable operators in the spring of 1991 concerning the LPTV permits. To a lesser extent, David Gardner and George Gardner also talked to cable operators.

341. There is only one isolated statement in Exhibit 1 that requires scrutiny. "It [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." This issue was specified because TBF proffered affidavits from Edward Rick of Ready Mixed Concrete Company (the Lancaster site) and Barry March of the Quality Inn (the Lebanon site) stating that they were unaware of any lease negotiations with Raystay. *Memorandum Opinion and Order*, FCC 93M-469 (released July 15, 1993). The findings establish that David Gardner made telephone calls to the Ready Mixed Concrete Company and the Quality Inn in October 1991 and confirmed the availability of both sites.

342. What is in dispute is whether David Gardner's two one-minute phone calls can fairly be described as "lease negotiations." The use of the word "discussions" instead of "lease negotiations" clearly would have been more accurate. In this connection, the phrase "lease negotiations" came from counsel after being fully apprised by David Gardner of his discussions. However, while admittedly imprecise, there is no evidence suggesting any intent to deceive the Commission concerning the state of Raystay's construction of its facilities. Raystay did not represent that it had a lease in hand or even intimate that it was close to reaching an agreement. Again, assuredly, if it wanted to falsely make a case for a grant of an extension request, it would have gone far beyond stating that it had "entered" into negotiations. It is thus concluded that while Raystay's exhibit may have contained language which can be characterized as "exaggerated" or "puffing", no intentional deception has been demonstrated. See *F.B.C., Inc., supra; Cannon, supra*.

343. The remaining matter requiring discussion is Raystay's second set of extension applications filed in July 1992. Exhibit 1 of the 1992 extension applications is the same as the Exhibit 1 used in the earlier extension applications. As reflected in the findings, the decision to use the same exhibit was made by counsel. Counsel made this decision because Raystay's construction efforts had not changed materially from what it reported earlier. Whatever one may think of this decision, it is clear it was not intended to deceive the Commission into believing Raystay had satisfied the criteria laid out in Section 73.3534(b). It boggles the mind to believe that the staff would not have

been aware that the second justification was identical to the first unsatisfactory justification. Clearly, if Raystay was bent on deceiving the Commission, it would have varied the statement either to show that substantial progress had been made (73.3534(b)) or that no progress had been made for reasons clearly beyond the control of the permittee (73.3554(3)). Raystay made neither of these claims. Instead, it told the staff again that no construction had been undertaken. The record does not reveal why the staff granted the extension requests since Raystay had clearly failed to satisfy the required criteria. It is clear, however, that it was not because the staff was deceived by Raystay as to its construction efforts.

344. Trinity and the Bureau argue that Raystay's motive in seeking extensions was to sell the bare LPTV permits. Initially, Raystay's motive is not relevant in the absence of evidence that Raystay misrepresented facts or was lacking in candor in statements to the Commission concerning the construction of the LPTVs.⁵⁵ As discussed, above, there is no such evidence. Further, the findings establish that the Bureau's and Trinity's speculation is without basis and contrary to the weight of the evidence. The record makes clear that Raystay applied for the construction permits in order to put them on the air as it had done in the case of TV40. It is also clear that prior to turning in the permits, Raystay and George Gardner never abandoned the intent to build the stations. Raystay was still developing a plan to put the stations on the air in October 1992. Thus, as testified by George Gardner, David Gardner and Sandifer, Raystay did not seek extensions so it could sell the permits. While Raystay talked to people who approached it with an interest in the permits, George Gardner never offered the permits for sale and never authorized his subordinates to offer the permits for sale. The most that can be gleaned from the testimony is that if Raystay sold TV40, it would have been willing to sell the permits. TV40 has not been sold to this day, however. Raystay had no interest in selling the Lancaster or Lebanon permits separate and apart from TV40.

345. Further, Raystay would gain little from selling the bare permits. All it could claim was the costs of preparing the applications since no construction was begun. As testified by Sandifer, the insignificant money Raystay could have received would not have justified the time and administrative costs involved. Also, Raystay's failure to negotiate an express provision with Greyhound allowing the permits to be sold to a third party also shows it was not seeking extensions for the purpose of selling the permits.

346. Even if Raystay was motivated to seek extensions for the purpose of selling the permits, such motivation would not be improper. A permittee has the right to assign its permit, subject to compliance with the Commission's rules. *Jose M. Oti d/b/a Sandino Telecasters*, 8 FCC Rcd 2573, 2575 n.6, 72 RR 2d 611, 613 n., 6 (1993). In *Beacon Radio, Inc.*, 18 FCC 2d 648, 650, 16 RR 2d 925, 927 (1969) the Commission said, "While we recognize that the purpose of Beacon's request is to preserve its construction permit so that it may be assigned to another party, this fact alone does not warrant a denial of its request." The record is

⁵⁴ While Sandifer's efforts were directed toward TV40, Raystay's operating LPTV station, his efforts were relevant to the construction permits since the idea was to tie TV40 and the permits into a network.

⁵⁵ The first required element of both misrepresentation and

lack of candor is either a false statement of, or an intentional failure to state an essential fact. The second required element of both misrepresentation and lack of candor is the intent to deceive. *Fox River, supra*, at 129.

clear that Raystay never had any understanding or agreement to sell the Lancaster or Lebanon permits. It therefore had no obligation to report anything concerning sales negotiations or related matters.

347. Contrary to Trinity's assertions, Raystay also had no obligation to report the fact that its budgets did not allocate funds to construct the LPTV stations. The application form did not request such information. With respect to past budgets, Raystay had already told the Commission that it had not started construction, so no purpose would be served in mentioning budgets that covered prior periods. The only conceivable relevance of the budgets is if the budget was evidence that Raystay would not construct the stations in the future. Sandifer's testimony makes clear that the budgets were not such evidence because Raystay often made adjustments and undertook construction that was not contemplated in the budget for that fiscal year. Moreover, there is no evidence that the content of Raystay budget was even considered in connection with the preparation of the extension applications, so it cannot be concluded that Raystay tried to hide its budget from the Commission. No lack of candor can be found with respect to Raystay's budget.

348. Raystay was under no obligation to report the Greyhound loan agreement in the extension applications because there was no loan agreement until after the second extension application was filed. Further, nothing in the Commission's rules or the application form requires an applicant to report an agreement before it is entered into. In addition, the loan agreement (or the negotiations relating thereto) had nothing to do with why the stations were not built. The restrictions were not in effect prior to August 1992, and there is no support for the speculation that the possibility of such restrictions caused Raystay not to construct. Moreover, as the record reflects, both Sandifer and George Gardner understood that there were many ways Raystay or its stockholders could have built the stations notwithstanding the restrictions in the loan agreement.

349. Assuming that an argument could be made that the term "lease negotiations" constitutes a "misrepresentation", disqualification of Glendale would be unwarranted. There is no evidence that George Gardner had any reason to know that the statement was false. George Gardner had Sandifer review the first set of extension applications before he reviewed and signed them. David Gardner told Sandifer that he was having discussions with property owners. While George Gardner did not have personal knowledge of what negotiations had taken place, he knew that it was part of David Gardner's job responsibility to negotiate such leases for Raystay. Since David Gardner and counsel had worked on the application, and since Sandifer had reviewed the application, he had a more than reasonable basis for accepting the statement. Under the circumstances, George Gardner had no reason to believe the statement was false and he can not be held responsible for any impropriety on the part of David Gardner.

350. In sum, Trinity, which has the burden of proof, has utterly failed to show an intent by Raystay to deceive the Commission. Therefore, the issue is resolved in favor of Glendale.

Assignment of Red Lion Construction Permit

351. The issue calls for a determination whether Raystay made misrepresentations or lacked candor in the application for assignment of the construction permit for Red Lion in which it certified that expenses in the amount of \$10,498 had been incurred for the purposes permitted in the Commission's rules. 47 C.F.R. §73.3597(c)(2). The findings establish that the expense certification was accurate and reasonable. Raystay neither misrepresented facts or lacked candor in its expense certification and there has been no intent on the part of Raystay to deceive the Commission.

352. Raystay had total legal fees in the amount of \$15,397.03 for the five unbuilt construction permits. The total figure was supported by invoices covering the entire amount and by Berfield's testimony regarding services provided for those fees. Neither the Bureau or Trinity offered evidence rebutting the accuracy of this figure as legal costs legitimately and prudently expended within the meaning of 47 C.F.R. 73.3597(c)(2). Berfield determined that one-half of that total, or \$7,698, constituted expenses that could be reimbursed in connection with the Red Lion permit. Berfield's reasoning is set forth in paragraphs 285-289 and need not be repeated here. Suffice it to say that his allocation methodology was a reasonable judgment on his part. Even if one were to disagree with his allocation methodology, the record is barren of evidence indicating an intent to deceive the Commission.

353. Engineering fees totaled \$7,275 for the five low power television applications. However, there were only three transmitter site locations, i.e., Red Lion, Lebanon and Lancaster since the two applications for Lebanon were for the same site and the two applications for Lancaster were for the same site. Berfield believed that the engineering work was essentially site related and since only three sites were involved, he allocated the engineering fee one-third to each site. On this basis and taking into account the factors detailed in paragraphs 291-296, he allocated \$2,425 as the engineering fee for the Red Lion site.⁵⁶ Berfield's allocation of one-third of the engineering work to Red Lion was a reasonable judgment on his part that has been borne out by the record. In any event, there is not a scintilla of evidence permitting a conclusion that Raystay or his attorney concocted false figures to inflate the amount claimed for expenses or otherwise intended to deceive the Commission.

354. The FCC filing fee in the amount of \$375 applied directly and exclusively to the Red Lion application. The amount is not disputed.

355. In adding the issue (FCC 93M-631, released October 4, 1993), the Presiding Judge agreed with Trinity that *Integrated Communications System, Inc. of Massachusetts*, 5 RR 2d 725, 726-727 (Rev. Bd. 1965) was precedent for employing a pro-rata allocation in situations where common costs are incurred for multiple permits (Par. 5). However, at the hearing, the parties were advised that a closer reading of *Integrated* does not support that position (Tr. 5599-5601). On the contrary, the important holding of *Integrated* is that there must be a relationship between the expenses claimed and the work actually done. The fact that

⁵⁶ As discussed, in the findings (pars. 298-299), Berfield's figure for engineering expenses for the Red Lion permit in the amount

of \$2,425 was low by \$100.

in *Integrated*, it was determined on the basis of pertinent records that one third of the total costs was a proper allocation is not inconsistent with this holding.⁵⁷

356. Berfield relied on the principles enunciated in *Integrated* in gearing his allocation to a study of the facts reflected in the invoices and time records of his law firm and other pertinent information. It is concluded that reasonable and fair expenses were allocated here. Moreover, none of the elements of misrepresentation or lack of candor has been established.

357. Trinity and the Bureau argue that Raystay should have disclosed in its certification that the expense figures were based upon an allocation and that Raystay lacked candor by not disclosing that fact. Trinity Conclusions, ¶73 4 at 509, Bureau Conclusions, ¶34 7 at 180. Both Trinity and the Bureau have failed to cite any rule, regulation, policy statement, application form or instructions relative to an application form that requires this. Moreover, the figures were accurate, so no motive can be found for Raystay to hide that information.

358. Even if there had been some false statement in the application (which there wasn't), there is no basis for penalizing George Gardner or Glendale. Since George Gardner is the common link between Raystay and Glendale, Glendale cannot be disqualified in the absence of evidence that George Gardner acted with an intent to deceive the Commission. Trinity has never alleged that George Gardner had knowledge of the details of the expense certification of Raystay which Trinity claims contained false statements. The Bureau recognizes this principle and concludes that the issue must be resolved in Glendale's favor because George Gardner had no role in preparing, reviewing or signing the Red Lion assignment application. The Bureau is correct in this respect. The issue is resolved in favor of Glendale. It is concluded that Glendale is qualified to be a licensee.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,⁵⁸ the application of Glendale Broadcasting Company for a construction permit for a new television station in Miami, Florida IS GRANTED; and the application of Trinity Broadcasting of Florida, Inc. for renewal of license of television station WHFT(TV), Miami, Florida IS DENIED.

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

⁵⁷ Notwithstanding the Presiding Judge's ruling, in their findings, Trinity and the Bureau cling to the mistaken view that Raystay should have taken a *pro rata* share without evaluating the work that was done.

⁵⁸ In the event exceptions are not filed within 30 days after the

release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).