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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W. -- Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Trinity Broadcasting of Florida, Inc.
MM Docket No. 93-75

Dear Mr. Caton:

Enclosed for filing please find an original and 14 copies of two pleadings:

(1) Petition of Colby May for Leave to Intervene, to File Comments, and to Participate in Oral Argument; and

(2) Comments of Intervenor Colby May in Response to Mass Media Bureau's Opposition to Motion to Vacate the Record on Improvidently Designated Issues.

Please stamp as filed one additional copy of each of these pleadings and return them with our messenger. Thank you for your consideration.

Very Truly Yours,

Eric Grant

Eric Grant

Enclosures

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

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

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To: The Commission

COMMENTS OF INTERVENOR COLBY MAY IN RESPONSE TO MASS MEDIA BUREAU'S OPPOSITION TO MOTION TO VACATE THE RECORD ON IMPROVIDENTLY DESIGNATED ISSUES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY 1

INTRODUCTION 2

DISCUSSION 8

COLBY MAY'S ADVICE—THAT THE "MINORITY-CONTROLLED" EXCEPTION TO THE MULTIPLE OWNERSHIP RULE IS SATISFIED IF MINORITIES OWN MORE THAN 50% OF THE LICENSEE—WAS REASONABLE 8

A. Colby May's 1986-1987 Advice Was Reasonable Because Contemporaneous Legal Materials Would Not *Necessarily* Have Led A Reasonable Attorney To The Position Adopted By The Commission In Its 1993 Hearing Designation Order 9

1. The plain language of the exception 9
2. "Note 1" to § 73.3555 13
3. The Commissioners' contemporaneous understanding of the exception 16
4. Other contemporaneous Commission action 18
5. The LPTV minority preference 19
6. Other definitions of "control" in the Commission's Rules 20
7. The Commission's purpose in adopting the exception 22
8. Application forms and Commission staff contacts 26

B. Nothing In The Mass Media Bureau's Most Recent Filing Casts Any Doubt On The Reasonableness of Colby May's Advice 28

1. The cases cited in the Hearing Designation Order 28
2. *Metro Broadcasting* 30
3. The supposed distinction between the application requirements and the "real" requirements 31
4. Commissioner Patrick's statement 32
5. The Commission's statements in *Reexamination of Section 73.3555* 32
6. The LPTV minority preference 33

CONCLUSION 37

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases:

ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) 11, 12

Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995) 22

Black & Decker Corp. v. Commissioner, 986 F.2d 60 (4th Cir. 1993) 14

Colautti v. Franklin, 439 U.S. 379 (1979) 12

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 11

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 13

Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) 11

Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191 (D.C. Cir. 1996) 3

Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1993 (11th Cir. 1985) 3

Maness v. Meyers, 419 U.S. 449 (1975) 2

Meese v. Keene, 481 U.S. 465 (1987) 12

Metro Broadcasting v. FCC, 497 U.S. 547 (1990) 23, 24, 31

Morales v. Trans World Airlines, 504 U.S. 374 (1992) 13

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 12

Ohio Power Co. v. FERC, 954 F.2d 779 (D.C. Cir.), *cert. denied*, 506 U.S. 981 (1992) 13

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 24

TV9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) 11

Telephone & Data Sys. v. FCC, 19 F.2d 42 (D.C. Cir. 1994) 24

Page

WHDH, Inc., 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971) 29

Watt v. Alaska, 451 U.S. 259 (1981) 14

In re Watts, 190 U.S. 1 (1903) 3

Administrative Decisions:

Arnold L. Chase, 5 FCC Rcd 1642 (1990) 29

Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, 10 FCC Rcd 2907 (1995) 24

Amendment of Section 73.3555, 100 FCC 2d 74 (1985) . . . . . passim

Amendment of Sections 3.35, etc., 18 FCC 288 (1953) 14

Attribution of Ownership Interests, 97 FCC 2d 977 (1984) 10, 12-14

Brown Broadcasting Serv., 59 FCC 2d 167 (1976) 12

Fox Television Stations, 10 FCC Rcd 8452 (1995), *recon. denied*, 11 FCC Rcd 7773 (1996) 2-4, 27, 37

Fox Television Stations, 11 FCC Rcd 7773 (1996) 3, 28, 30, 36

Francisco Resto Torres, 7 FCC Rcd 1696 (1992) 12

Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 10 FCC Rcd 403 (1994) 21

Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 11 FCC Rcd 136 (1996) 22

Implementation of Sections 202(c)(e) of the Telecommunications Act of 1996, 61 Fed. Reg. 10691 (1996) 1

Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 2988 (1994) 24

Page

Low Power Television Broadcasting, 82 FCC 2d 47 (1980) 19

Metro Broadcasting, 96 FCC 2d 1069 (Rev. Bd. 1984) 14, 15

Murray Hill Broadcasting Co., 8 FCC Rcd 325 (1993) 12

On the Beach Broadcasting, 8 FCC Rcd 3123 (1993) 12

Pan Pacific Television, 3 FCC Rcd 6629 (1988) 29

Random Selection Lotteries, 93 FCC 2d 952 (1983) 10, 20, 34

Reexamination of the Single Majority Stockholder and Minority Incentive Provisions, 50 Fed. Reg. 27629 (1985) 18, 32

Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382 (1940) 14

Roanoke Christian Broadcasting, 92 FCC 2d 1477 (Rev. Bd. 1983) 10

Southwest Tex. Public Broadcasting Council, 85 FCC 2d 713 (1981) 28

Trustees of Univ. of Pa. Radio Station WXPN(FM), 69 FCC 2d 1394 (1928) 28

Statutes and Other Legislative Materials:

Communications Act of 1934, 47 U.S.C. § 309(i)(3) 20, 34

Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115(c), 96 Stat. 1087 . . . . . 23, 33

Federal Register Act, 44 U.S.C. §§ 1504-1505 3

Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(A), 110 Stat. 56 1

S. 2962, 98th Cong., 2d Sess. (1984) 23

H.R. 6134, 98th Cong., 2d Sess. (1984) 23

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44, *reprinted in* 1982 U.S.C.C.A.N. 2261 25

Page

Commission Rules:

47 C.F.R. § 0.602(c) 17

47 C.F.R. § 1.622(b)(1) 20

47 C.F.R. § 1.2110(b)(2), (4)(ii)(B) 21

47 C.F.R. § 20.6(d)(1) 20

47 C.F.R. § 24.320(c)(1), (h)(1) 21

47 C.F.R. § 24.709(b)(5)(i)(B) 20

47 C.F.R. § 24.720(c)(1), (k)(1) 21

47 C.F.R. § 61.171 20

47 C.F.R. § 73.3555(d) . . . . . passim

47 C.F.R. § 76.934(a) 20

Other Authority:

Richard E. Wiley, *The Media and The Communications Revolution: An Overview of the Regulatory Framework and Developing Trends*, 231 PLI/Pat 421 (Prac. L. Inst. Nov. 13, 1986) 17

SUMMARY

Intervenor Colby May submits these comments in order to address serious—and unjustified—charges leveled against him by the Mass Media Bureau in this proceeding. The Bureau has accused Mr. May, an experienced communications attorney, of exhibiting "a lack of candor" with the Commission in connection with three applications that he filed on behalf of his client to acquire a full-power television station under the minority ownership exception to the national multiple ownership rule, former 47 C.F.R. § 73.3555(d).[1] The Mass Media Bureau's accusations are apparently based on its conclusion that Mr. May interpreted § 73.3555(d) in a manner that not only was mistaken, but was so unreasonable as to be incredible. We respectfully submit that the Bureau's position is untenable. As demonstrated below, Mr. May's position was *a* reasonable interpretation—indeed, *the most* reasonable interpretation—of § 73.3555(d) based on the authorities available to him at the time.

Mr. May advised his clients in 1986-87 that a station could qualify as "minority-controlled" for purposes of the multiple ownership rules if the station was more than fifty percent owned by members of minority groups or, in the case of a non-stock non-profit entity like his client National Minority TV, Inc. ("NMTV"), if a majority of the directors were minorities. The Commission concluded otherwise six years later in its Hearing Designation Order in this case. But that does not render Mr. May's earlier conclusion unreasonable. Quite the contrary, Mr. May's conclusion that minority ownership was

[1] The numerical station limitations of the national television multiple ownership rule were eliminated by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(A), 110 Stat. 56, 111. *See also* Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996, 61 Fed. Reg. 10691 (1996) (revising § 73.3555 in accordance with the statute). For convenience, § 73.3555 will be cited as it existed between its amendment in 1985 and the institution of this proceeding in 1991.

sufficient, in itself, to qualify as "minority-controlled" was consistent with the plain language of § 73.3555(d). So too, at the time that the "minority-controlled" exception was adopted, individual Commissioners interpreted the provision precisely as had Mr. May. Mr. May's position was also consistent with the Commission's policy determination, credited by the Supreme Court in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), that minority ownership is desirable in its own right because it may ultimately lead to programming diversity. No authority available at the time indicated, much less established conclusively, that something more than minority ownership was necessary to qualify as a "minority-controlled" station. In view of these and other considerations discussed below, Mr. May's interpretation of § 73.3555(d) was entirely correct at the time or, at the very least, reasonable.

INTRODUCTION

The Commission has acknowledged the vital role played by experienced communications counsel in helping their clients understand and comply with often complex regulatory requirements. *See Fox Television Stations*, 10 FCC Rcd 8452, 8501 n.68 (1995) ("*FTS I*") ("We encourage licensees to consult experienced counsel and believe that licensees are generally entitled to rely on their advice."), *recon. denied*, 11 FCC Rcd 7773 (1996) ("*FTS III*"). The Commission has thus endeavored to avoid "creat[ing] an environment in which licensees are discouraged from seeking and following the advice of legal counsel." *Id.*[2] Yet, if the Mass Media Bureau's position in this case were to be accepted, counsel

[2] This same underlying principle—that attorneys, clients, and the "due administration of justice" are better served when attorneys cannot be penalized for their good faith legal advice—has been widely recognized by the Supreme Court and the lower federal courts. *See, e.g., Maness v. Meyers*, 419 U.S. 449, 467 (1975) (If a lawyer may be punished for good faith advice about a client's legal right, "there is a genuine risk that [the client] will not be (continued...)

would be deterred from offering, and clients from accepting, advice on all but the most settled issues. An attorney who failed accurately to anticipate how the Commission would resolve an issue would, like Colby May, risk subjecting his client to severe penalties and himself to career-threatening censure. As the Commission recognized in the *FTS* proceeding, such a regime thus would impede the Commission's regulatory processes by undermining the atmosphere of cooperation between its staff, licensees and potential licensees, and their representatives.

In order to assure that members of the communications industry and their counsel are not unduly penalized for good faith interpretations of the law that turn out to be contrary to the Commission's subsequent interpretations, the Commission has applied a "reasonable applicant" standard: whether a "reasonable applicant" would, after consulting the published authorities available at the time, "necessarily" have reached the same conclusion later reached by the Commission. *FTS I*, 10 FCC Rcd at 8486; *accord FTS III*, 11 FCC Rcd at 7781.[3] If the answer to that question is "no," the applicant and his counsel should not be deemed to have acted unreasonably in taking a position inconsistent with the

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[2](...continued)
advised of his right."); *In re Watts*, 190 U.S. 1, 29 (1903) ("[I]f an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule."); *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1208 (11th Cir. 1985) ("It is essential that lawyers have the liberty to advise their clients of the legal consequences of proposed courses of action free of a Damoclean sword.").

[3] The directive that the reasonableness of counsel's advice be assessed based on published authority is particularly appropriate in light of the Federal Register Act, 44 U.S.C. §§ 1504-1505. As the District of Columbia Circuit recently observed, the Act reflects a congressional policy "to protect regulated entities from harm—including economic injury—they might suffer because of the government's failure" to disseminate regulatory requirements. *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1205 (D.C. Cir. 1996).

Commission's ultimate position.

Whether an attorney's legal interpretation is "reasonable" is critical to the issue of whether the attorney has exhibited "candor" toward the Commission. The Commission has stated that "[t]he duty of candor requires an applicant before the FCC to be fully forthcoming as to all facts and information *relevant* to its application." *FTS I*, 10 FCC Rcd at 8478 (emphasis added); *see also id.* (defining "[r]elevant information" as "information that may be of 'decisional significance'"). Moreover, "an applicant or licensee [cannot] be found to have withheld relevant information" unless it is "shown that the party knew that the information was relevant and intended to withhold it." *Id.* An applicant who relies on the advice of its attorney—based on a good faith but erroneous interpretation of the law—that a particular item of information is not relevant can hardly be found to have "lacked candor" in not disclosing the item.

The circumstances here are indistinguishable from those in *FTS*. The Commission declared in 1993 in this proceeding that the minority exception applies only where the station is both owned and controlled by members of minority groups. *See* Hearing Designation Order ¶ 37, 8 FCC Rcd 2475, 2480 (1993) ("HDO") ("[W]e specifically reject the thesis that 'ownership' and not 'control' is the only benchmark the Commission may use in determining compliance with the Commission's multiple ownership rules relating to minority-controlled entities."). These comments are directed to a single issue: whether the contrary advice that Mr. May gave to his client in 1986-1987—advice that was relied upon by NMTV in applying to acquire full-power television stations—was objectively "unreasonable" under the Commission's then existing precedents. Mr. May advised that the minority exception in § 73.3555(d) was satisfied where, as in this case, a majority of the owners of a station were members of minority groups; it was thus unnecessary for the

minority owners to exercise actual working control over the station.

The underlying facts of this case have already been addressed by the parties and will not be repeated at length here. Briefly, in late 1986, Mr. May advised his client NMTV that it was eligible to acquire a full-power television station in Odessa, Texas. At the time, the Commission's national multiple ownership rule limited to twelve the number of full-power television stations that a party could own, control, or have a cognizable interest in; however, the limit was increased to thirteen if one of the stations qualified for the minority exception in § 73.3555(d) and to fourteen if two of the stations qualified. The amended rule provided that the exception applied if the thirteenth or fourteenth station was "minority-controlled," which was defined as "more than 50 percent owned by one or more members of a minority group." It was, and is, clear that a non-profit, non-stock corporation is deemed to be owned by its board of directors. *See* n.7, *infra*. Thus, a station was "more than 50 percent owned by one or more members of a minority group" if members of minority groups constituted a majority of the licensee's board of directors. Because Dr. Paul Crouch, the president and a director of NMTV, already had cognizable interests in twelve stations by virtue of his position as the president of Trinity Broadcasting Network ("Trinity"), the Odessa station could not have been acquired by NMTV unless the station qualified for the minority exception. Mr. May concluded that the Odessa station, in NMTV's hands, would qualify for the exception, notwithstanding Dr. Crouch's interest in the station. Mr. May reached this conclusion because NMTV "was a minority owned company by virtue of the fact that a majority of the Directors were minorities." Testimony of Colby M. May ¶ 22, TBF Ex. 105 at 13.[4]

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[4] The ALJ described May's advice as follows:

(continued...)

Mr. May subsequently filed an application with the Commission seeking assignment of the Odessa station to NMTV. In the application, Mr. May disclosed Dr. Crouch's interest in Trinity's twelve full-power television stations. In an exhibit to the application specifically titled "Broadcast Interests and Statement of Compliance with Rule 73.3555(d)," Mr. May then proceeded to explain why the acquisition would not, in his view, violate the national multiple ownership rule despite Dr. Crouch's extensive participation in NMTV's affairs:

> Commission Rule 73.3555(d)(1) permits an ownership interest in up to 14 television facilities provided the licensee organization is minority-controlled. In this instance, while one of National Minority TV, Inc.'s principals, Paul F. Crouch, presently has an interest in 12 commercial television facilities . . . , *a majority of its directors are minorities, and National Minority TV, Inc. is therefore minority controlled and in compliance with rule 73.3555(d)(1).*

Application for Consent to Assignment, Ex. I, *in* TBF Ex. 101, Tab Q at 32-33.[5]

As discussed below, there are numerous reasons why Mr. May was entirely correct —or, at the very least, reasonable—in concluding that a television station is "minority-controlled" for purposes of § 73.3555(d)(1) if a majority of its owners are minority group members or, in the case of non-stock corporations like NMTV, if "a majority of its directors are minorities." *First*, Mr. May's position was consistent with the plain language of the rule. *Second*, Mr. May's interpretation of the rule was consistent with the interpretation advanced

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[4](...continued)

> May concluded that because two of the three persons on [NMTV's] board were minorities, [Trinity] could obtain an interest in a thirteenth full power commercial television station . . . . In May's view, [NMTV's] legal standing and the racial and ethnic identity of its three board members were the crucial factors which would allow [Trinity] and [NMTV] to qualify for the [minority] exception to the rule of 12.

Initial Decision ¶ 57, 10 FCC Rcd 12020, 12029 (1995) ("ID") (citing May Testimony, TBF Ex. 105 at 13-14).

[5] Virtually identical language appeared in the application for the Portland, Oregon station. *See* Application for Consent to Assignment, Ex. I, *in* TBF Ex. 101, Tab T at 65.

by individual Commissioners when § 73.3555(d) was adopted and with other Commission authority. *Third*, Mr. May's position was also consistent with the Commission's policy of encouraging minority ownership of broadcast stations in order to promote programming diversity. *Fourth*, although the Mass Media Bureau had ample opportunity, both in its application forms and in its discussions with Mr. May regarding the applications, to indicate that minority ownership was not sufficient to qualify for the exception, the Bureau did not do so. Accordingly, although the Commission ultimately decided in 1993 that the exception required both ownership and actual working control, Mr. May was not unreasonable in concluding otherwise six years earlier based on the authorities available to him at the time. In fact, his conclusion was supported by every relevant authority then available.

In its Consolidated Reply to Exceptions ("MMB Reply") filed last February, the Mass Media Bureau attempted to distinguish *FTS I* on the ground that, in contrast to the situation in that proceeding, the proper interpretation of § 73.3555(d) was "settled" at the time that Mr. May gave his advice and, therefore, that his advice was "incredible." MMB Reply at 16, 17, ¶¶ 20, 23. But any suggestion that the matter was "settled" in 1986-87 borders on the preposterous. Significantly, the Bureau in its most recent filing ignores the issue of reasonableness and argues only that Mr. May's advice was wrong. *See* Mass Media Bureau's Opposition to Motion to Vacate the Record on Improvidently Designated Issues at 12-21, ¶¶ 20-33 (Oct. 25, 1996) ("MMB Opp."). It is whether Mr. May's advice was reasonable, however, not whether it was correct, that determines whether, under the standard confirmed in *FTS I*, Mr. May and his clients may properly be sanctioned for a supposed lack of candor. Any harsher standard would be highly unfair to counsel and

clients and would ultimately impede the Commission's regulatory processes.[6]

DISCUSSION

COLBY MAY'S ADVICE—THAT THE "MINORITY-CONTROLLED" EXCEPTION TO THE MULTIPLE OWNERSHIP RULE IS SATISFIED IF MINORITIES OWN MORE THAN 50% OF THE LICENSEE—WAS REASONABLE

Under the applicable legal standard, Colby May's advice regarding the minority exception of § 73.3555(d)(1) was certainly reasonable. The materials available to Mr. May when he rendered his advice in 1986-87 could not possibly have led a reasonable attorney to "necessarily" conclude that the minority exception required anything more than 50 percent minority ownership. To the contrary, these contemporaneous materials uniformly supported the position taken by Mr. May.

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[6] The Mass Media Bureau attempts to justify its approach by suggesting that, despite the absence of any dispositive authority interpreting the minority exception in § 73.3555(d) in 1986-87, Mr. May somehow "knew" that the Commission would reject his interpretation some six years hence. But the Administrative Law Judge, who had an opportunity to observe Mr. May's testimony on this issue, did not conclude that Mr. May lacked candor or disqualify his client on that ground. Nor has the Bureau offered any facts to support its suggestion—which in any event would require Mr. May to have had a greater understanding of the Commission's intent than, for example, Chairman Fowler and Commissioner Patrick. *See* section A.3, *infra*.

In this context, the Bureau cites ¶ 57 of the ID for the proposition that "May did understand that neither Crouch nor [Trinity] could exercise actual working control over NMTV." MMB Reply at 15, ¶ 20. It is this very ¶ 57, however, that credits Mr. May's testimony regarding his advice: "*In May's view* [at the time], [NMTV's] legal standing and the racial and ethnic identity of its three board members were the crucial factors which would allow [Trinity] and [NMTV] to qualify for the [minority-controlled] exception to the rule of 12." 10 FCC Rcd at 12029 (emphasis added). Moreover, ¶ 57 also acknowledges that Mr. May, despite his awareness that Note 1 to § 73.3555 contained a reference to the concept of "actual working control," did not consider this concept to be relevant to the particular issue he faced: "May is aware that under Note 1 [to § 73.3555] control is not limited to minority [sic] stock ownership but includes actual working control. However, May claimed he paid no attention to Note 1 or Commission precedent interpreting Note 1." *Id.* While other portions of ID ¶ 57 may be inconsistent, those later findings are simply at variance with Mr. May's testimony, as the Trinity Motion to Vacate (at 67-76) makes clear.

The Mass Media Bureau cannot point to any authority before 1993 that compels a contrary conclusion. The minority exception was first adopted in the *Amendment of Section 73.3555*, 100 FCC 2d 74 (1985), released on February 1, 1985. Between that date and the time that Mr. May rendered his advice two years later, the Commission had not interpreted the term "minority-controlled" in a manner contrary to the term's ownership-only definition in the text of the rule. Indeed, until the 1993 HDO in this proceeding, the Commission had never developed *any* precedent or practice giving that term an interpretation contrary to Mr. May's. The Mass Media Bureau itself concedes that, "[w]hile the Commission certainly could have explicitly required that minority group members have both *de jure* and *de facto* control of an entity," the Commission "fail[ed] to do so in the context of the multiple ownership rules." MMB Opp. at 16-17, ¶ 26.

A. Colby May's 1986-1987 Advice Was Reasonable Because Contemporaneous Legal Materials Would Not *Necessarily* Have Led A Reasonable Attorney To The Position Adopted By The Commission In Its 1993 Hearing Designation Order.

1. The plain language of the exception.

In 1985, the Commission established new national multiple ownership limits for radio and television broadcasting. As amended, the national multiple ownership rules prohibited a "party or any of its stockholders, partners, members, officers or directors" from "directly or indirectly, owning, operating or controlling or having a cognizable interest in, either: (A) more than fourteen (14) stations in the same service, or (B) more than twelve (12) stations in the same service which are not *minority-controlled*." *Amendment of Section 73.3555*, 100 FCC 2d at 99-100 (emphasis added) (adopting § 73.3555(d)(1)). In other words, the new rule granted an exception: otherwise prohibited interests were permitted in two additional stations if those stations were "minority-controlled." Because the key term

at the end of this rule was a new one, the Commission took care to define it in precise and plain fashion: "'minority-controlled' means more than 50 percent *owned* by one or more members of a minority group." *Id.* at 100 (emphasis added) (adopting § 73.3555(d)(3)(C)).[7] Significantly, the Commission chose to define "minority-controlled" by reference to the sort of interest that *minorities* were *required* to have in the licensee, *not* by reference to the sort of interest that *non-minorities* were *forbidden* to have in the licensee.[8]

A precise definition of the term "minority-controlled" was necessary because, as the Commission itself acknowledged, it had "adopted different standards of minority control depending on the mechanism used to foster its minority policies." *Id.* at 95. This acknowledgment alone would have caused a reasonable attorney, in attempting to discern the

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[7] The 1985 opinion and order did not specifically address the circumstances in which a station held by a non-stock corporation would qualify for the exception. At the time, however, Commission precedent made clear that such a corporation would be deemed to be "owned" by its directors. *See Roanoke Christian Broadcasting*, 92 FCC 2d 1477, 1478-79 (Rev. Bd. 1983) (treating directors of non-stock corporation as owners for purposes of awarding integration credit); *Random Selection Lotteries*, 93 FCC 2d 952, 953, 977 (1983) (determining, for purposes of granting preferences to "applicants more than 50% controlled by minorities," that "nonstock corporations . . . should be judged as to minority status on the basis of the composition of the board [of directors]"). The Commission endorsed that precedent in the present proceeding, noting that "[i]n a non-stock corporation, the Commission normally looks to directors in evaluating ownership and control." HDO ¶ 4, 8 FCC Rcd at 2475 n.1 (citing *Roanoke Christian Broadcasting*). As set forth above, more than 50% of the directors of NMTV, a non-stock corporation, were members of minority groups. Accordingly, there is no question about the correctness of Mr. May's advice that the Odessa station, as acquired by NMTV, was "more than 50 percent *owned* by one or more members of a minority group."

[8] Nothing in the language of the rule limits the sort of interest that *non*-minorities may have in a station, so long as the station is "more than 50 percent owned by one or more members of a minority group." It could thus reasonably be concluded that non-minorities could, consistent with the rule, possess any other interest in the station, including actual working control. *See* Attribution of Ownership Interests, 97 FCC 2d 977, 999 (1984) (the definition of a "cognizable interest" for purposes of multiple ownership rules "make[s] no distinction between a controlling interest and a non-controlling, minority interest . . . , reasoning that minority shareholders can have considerable voice in the control and management of a corporate licensee").

meaning of "minority-controlled" for purposes of the multiple ownership rule, to focus primarily, if not exclusively, on the particular "standard" set forth in the "minority-controlled" exception. In drafting that exception, the Commission deliberately chose a definition of "minority-controlled" that focused only on percentage ownership: "In the context of the multiple ownership policies, we believe that *a greater than 50 percent minority ownership interest* is an appropriate and meaningful standard for permitting increases to the rules adopted herein." *Id.* at 95 (emphasis added); *accord id.* at 97-98 ("For purposes of the rules adopted herein, minority control shall be defined as a station having greater than a 50 percent minority ownership.").[9]

Because the language of the multiple ownership rule plainly defined "minority-controlled" solely in terms of minority *ownership*, Mr. May's conclusion that ownership was the sole relevant consideration was necessarily reasonable. As the Supreme Court has frequently instructed the lower courts, when the text of a legal rule is clear, that text should mark both the beginning and the end of the inquiry:

> [I]n interpreting a statute a court should always turn to one, cardinal canon [of construction] before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). These principles apply with no less force

[9] The Commission had long been aware, as a result of its comparative licensing policies, of the distinction between minority ownership *per se* and minority ownership coupled with participation in station management. *See, e.g., TV9, Inc. v. FCC*, 495 F.2d 929, 941 & n.1 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056, 1062-63 (D.C. Cir. 1975). Thus, it must be presumed that the Commission's failure to require minority participation in the management of the additional two stations permitted under § 73.3555(d)(1) was deliberate.

in the field of communications law. *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (per curiam), *cert. denied*, 485 U.S. 959 (1988).

Furthermore, these principles apply not only to statutes but also to the Commission's own rules. Thus, the Commission itself has acknowledged: "It is axiomatic that any reasonable and logical construction of a rule begins with its plain language." *Murray Hill Broadcasting Co.*, 8 FCC Rcd 325, 326 (1993); *accord, e.g., On the Beach Broadcasting*, 8 FCC Rcd 3123, 3125 (1993) (rejecting an argument "supported by more than a quarter century of precedent" because it "ignore[d] the plain language of the rule"). Consistent with all of these principles, the Commission has decreed that an applicant "is entitled to rely . . . on the plain language of the rule." *Francisco Resto Torres*, 7 FCC Rcd 1696, 1698 (1992). Indeed, "any applicant or interested party *must necessarily* rely" on such language. *Id.* at 1697 (emphasis added) (quoting *Brown Broadcasting Serv.*, 59 FCC 2d 167, 169 (1976)).

Accordingly, Mr. May was entitled to rely on the plain language of § 73.3555(d)(3)(C), under which "'minority-controlled' *means* more than 50 percent owned by one or more members of a minority group" (emphasis added). It is established that "a definition that declares what a term 'means' excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979); *accord, e.g., National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982); *cf. Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term."). In interpreting the term "minority-controlled," therefore, Mr. May was reasonable in not taking into account criteria that were not stated in § 73.3555(d)(3)(C)—including any criterion based on "de facto control" or "actual working control," because no such criterion was stated in the definition, which fixed on ownership alone.

2. "Note 1" to § 73.3555.

The Mass Media Bureau argues that the otherwise clear ownership-only definition of the term "minority-controlled" should be ignored because "Note 1 [to § 73.3555] informed applicants that control was not limited to majority stock ownership but included actual working control in whatever manner exercised." MMB Opp. at 20, ¶ 32.[10] According to the Bureau, "[t]he obvious meaning of this Note was that, in the context of the multiple ownership rules, the concept of control was not limited to *de jure* control but also included *de facto* control." *Id.* For the Bureau, the obvious import of Note 1 is that a station was not "minority-controlled" unless members of minority groups exercised *both* "de jure control" (*i.e.*, ownership) *and* "de facto control" (*i.e.*, actual working control). The Bureau, however, is wrong: Note 1 did not govern the "minority-controlled" exception to the multiple ownership rule; and in any event, a minority-*owned* station would still have qualified as a "minority-controlled" station, even if Note 1's definition were used.

First, Note 1 did not govern the exception. The more *specific* definition of "minority-controlled" found in § 73.3555(d)(3)(C) took precedence over the more *general* definition of "control" found in Note 1 to § 73.3555. It is an elementary canon of construction that "where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)); *accord Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992); *Ohio Power Co. v. FERC*, 954 F.2d 779, 784 (D.C. Cir.), *cert. denied*, 506 U.S. 981 (1992). The same canon applies to regulations.

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[10] At all relevant times, Note 1 to § 73.3555 has read as follows: "The word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised." *Attribution of Ownership Interests*, 97 FCC 2d 997, 1050 (1984); 47 C.F.R. § 73.3555 (1995).

See, e.g., Black & Decker Corp. v. Commissioner, 986 F.2d 60, 66 (4th Cir. 1993) ("Regulations, like statutes, are interpreted according to canons of construction.").

The ownership-only definition of "minority-controlled" in § 73.3555(d)(3)(C) was obviously more specific, because it applied only "[f]or purposes of subsection (d) of this section," namely, for purposes of § 73.3555(d)(1)(B) & (2)(B), the only other references to "minority-controlled" and the only provisions dealing with the minority exception. By contrast, Note 1's definition applied to the entire body of § 73.3555, which uses the term "control" in a variety of contexts. *See Attribution of Ownership Interests*, 97 FCC 2d 997, 1049-50 (1984) (setting forth text of § 73.3555 as of April 30, 1984); *Amendment of Section 73.3555*, 100 FCC 2d at 99-100 (setting forth new § 73.3555(d)). Moreover, there was surely no *clear* intention for Note 1 to take precedence over § 73.3555(d)(3)(C). The Commission's 1985 reconsideration order instituting the minority exception did not even restate Note 1, let alone discuss it. Accordingly, an attorney could reasonably have concluded that the definition of "minority-controlled" as meaning "more than 50 percent owned by one or more members of a minority group"—a definition that excludes consideration of anything other than ownership—was not qualified or overridden by Note 1.[11]

Second, even if Note 1 were used to interpret the term "minority-controlled," a

[11] The ownership-only definition of "minority-controlled" found in § 73.3555(d)(3)(C) also takes precedence over the hybrid definition of "control" found in Note 1 under "the maxim of construction that the more recent of two irreconcilably conflicting statutes governs." *Watt v. Alaska*, 451 U.S. 259, 266 (1981). The former definition is the more recent one because it first appeared in the Commission's Rules as part of the adoption of the "minority-controlled" station exception in 1985. On the other hand, Note 1 has been part of the multiple ownership rules since 1940. *See Rules Governing High Frequency Broadcast Stations*, 5 Fed. Reg. 2382, 2384 & n.6 (1940); *see also, e.g., Amendment of Sections 3.35, etc.*, 18 FCC 288, 295-96 & nn.1, 3, 5 (1953).

minority-*owned* station would still qualify as "minority-controlled," regardless of who exercised actual working control over the station. The Bureau's interpretation of Note 1—that it requires both ownership and actual working control by minority group members—is inconsistent with what Note 1 actually says. A literal application of Note 1 to the exception would result in *more* stations, not fewer, qualifying for the minority exception—the exact opposite of the Bureau's position.

Presumably, the Bureau's theory is that, notwithstanding the definition in § 73.3555(d)(3)(C) that "minority-controlled" means minority-owned, a station is nevertheless "minority-controlled" if members of minority groups "control" it as that term has been defined in Note 1. Under that construct, members of a group "control" a station if they *either* (1) have "majority stock ownership," *or* (2) exercise "actual working control in whatever manner."[12] *See, e.g., Metro Broadcasting*, 96 FCC 2d 1069, 1070 (Rev. Bd. 1984) (concluding that for purposes of the multiple ownership rules, a person with an equity interest otherwise too small to trigger the rules would still be deemed to have an "ownership interest" in a station if he exercised "actual working control" over the station). Minority group members would thus "control" a station—and therefore the station would be

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[12] To interpret Note 1 to make *both* majority stock ownership *and* actual working control necessary in order for a group to "control" a station is to do violence to the text. This is apparent when Note 1 as written is compared with Note 1 as apparently interpreted by the Bureau:

THE ACTUAL TEXT

> NOTE 1: The word "control" as used herein is not **limited to** majority stock ownership, but **includes** actual working control in whatever manner exercised.

THE BUREAU'S TEXT

> NOTE 1: The word "control" as used herein is not **satisfied by** majority stock ownership **alone**, but **also requires** actual working control in whatever manner exercised.

"minority-controlled"—if they *either* (1) owned a majority of the stock, *or* (2) exercised actual working control over the station. The crucial point is that *both* ownership *and* control are unnecessary; either alone suffices.

Therefore, by "not limit[ing]" the concept of control to stock ownership alone, Note 1 makes the exercise of actual working control *sufficient* to establish "control" but not *necessary*. If actual working control is sufficient but not necessary to control a station, then members of minority groups need not have actual working control in order for that station to be "minority-controlled" for purposes of § 73.3555(d). This, of course, is the very opposite of the Bureau's conclusion regarding Note 1. In sum, even if Note 1 were applicable in defining "minority-controlled" (which it is not), Note 1 cannot be read to compel the conclusion that something more than minority ownership was necessary in order for a station to qualify as "minority-controlled."

3. The Commissioners' contemporaneous understanding of the exception.

Significantly, the Commissioners who adopted the 1985 amendment to the multiple ownership rule understood, as did Mr. May, that minority ownership was sufficient for a station to qualify as "minority-controlled." Commissioner Patrick dissented from the Commission's decision to establish "different national ownership rules based on race," that is, have an exception at all. *Amendment of Section 73.3555*, 100 FCC 2d at 103 (separate statement of Commissioner Patrick). Under the exception as written, he argued, "the nexus between the use of racial classifications and the promotion of diversity is too tenuous." *Id.* at 104. He thought so for the following reasons:

> Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed *owners* alone. No further showing is required with respect to how these new owners may contribute to diversity. *No concern is given as to whether the 51% minority owners will exert any influence on the station's programming or will have any*

control at all.

Id. (emphasis added). Neither the Commission's reconsideration order nor the separate statement of any other Commissioner took issue with Commissioner Patrick's characterization of the minority exception.[13]

Moreover, during the meeting at which the national multiple ownership rule was amended, Commissioner Patrick commented on the minority exception in language essentially identical to that in his written statement. *See* Transcript of FCC Open Meeting: Multiple Ownership Item at 10 (Dec. 19, 1984), *in* Trinity Motion to Vacate, Tab 3. Again, no Commissioner took issue with this characterization of how the exception would operate, although Commissioner Rivera disagreed about whether the exception was desirable. *See id.* at 11-12. Indeed, Chairman Fowler explicitly stated: "I do agree with Commissioner Patrick's comments. I think he has it exactly right." *Id.* at 13.

Glendale Broadcasting characterizes any reference to the Commissioners' oral comments as "wrongful," because such comments "'do not themselves constitute action of the Commission.'" Opposition of Glendale Broadcasting Co. to Motion to Vacate at 27, 28-29 (Oct. 25, 1996) (quoting 47 C.F.R. § 0.602(c) (1995)). But whether or not the oral comments constitute official Commission action is beside the point here: a reasonable

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[13] We have been able to discover only one contemporaneous discussion of the exception in the literature, and it fully supports Mr. May's interpretation. An overview of the communications regulatory framework published in 1986 observed that the Commission had recently "adopted a number of rules designed to promote diversity in the ownership of the media of mass communications." Richard E. Wiley, *The Media and The Communications Revolution: An Overview of the Regulatory Framework and Developing Trends*, 231 PLI/Pat 421, 457 (Prac. L. Inst. Nov. 13, 1986). One of these rules was the 1985 amendment to the national multiple ownership rule that contained the minority exception: "The FCC also extended the limit on television station ownership to 14 if each station over the 12-station limit is minority-controlled. . . . (*Minority control occurs if minorities hold a greater than 50 percent ownership interest*)." *Id.* (emphasis added).

attorney may, and often will, consider the oral statements of the Commissioners. In any event, the oral statements cited here are completely consistent with the text of the reconsideration order and with Commissioner Patrick's accompanying written statement.

In sum, when a Commissioner publishes a statement that the applicability of the "minority-controlled" exception "turns upon the race of the proposed *owners alone*" and that no concern is given as to whether such owners "will have any *control* at all," when no other Commissioner challenges that statement as inaccurate, and when the Commissioners' oral comments are consistent with the published statement, a reasonable attorney would hardly be compelled to conclude that the exception's applicability turns on whether the minority owners will exercise de facto control.

4. Other contemporaneous Commission action.

Other contemporaneous Commission discussion of the minority exception to the multiple ownership rule also pointed toward the position that Mr. May adopted in his advice to Trinity and NMTV. In a notice of proposed rulemaking promulgated several months after the adoption of the minority exception, the Commission explained: "For purposes of [that exception], 'minority-controlled' broadcast stations are defined as those in which more than 50 percent of the equity interest is *owned* in the aggregate by persons who are members of a minority group." *Reexamination of the Single Majority Stockholder and Minority Incentive Provisions*, 50 Fed. Reg. 27629, 27630 (1985) ("*Reexamination of Section 73.3555*") (emphasis added). The Commission further explained its purpose behind the minority exception: "Our intention, of course, in permitting increased levels of multiple ownership only where minority-controlled stations are involved is to encourage investment in and support for these stations, thereby advancing our broad policy objective of promoting *minority ownership* of