

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

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In re applications of ) MM Docket No. 93-75  
)  
Trinity Broadcasting of Florida, Inc. )  
for Renewal of License of Station ) File No. BRCT-911001LY  
WHFT-TV, Miami, Florida )  
)  
Glendale Broadcasting Company )  
for a Construction Permit for a New ) File No. BPCT-911227KE  
Commercial Television to Operate on )  
Channel 45, Miami, Florida )  
)  
To The Commission )

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Federal Communications Commission  
Office of Secretary

**OPPOSITION TO PETITION OF COLBY MAY FOR LEAVE TO INTERVENE,  
TO FILE COMMENTS, AND TO PARTICIPATE IN ORAL ARGUMENT**

The Spanish American League Against Discrimination ("SALAD") respectfully opposes the November 15, 1996 "Petition of Colby May for Leave to Intervene, to File Comments, and to Participate in Oral Argument" ("May Petition"). May relies primarily on West Jersey Broadcasting Company, 89 FCC2d 469 (1980) ("West Jersey") and Quality Broadcasting Corp., 4 RR2d 865 (1965) ("Quality") in contending that Commission policy permits late interventions such as his.

There are seven independent grounds for rejection of the May Petition.

1. The May Petition is three years late without good cause.

May is doing what the D.C. Circuit has frowned upon since the last great War: "sit back and hope that a decision will be in [his] favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941).

Petitions to intervene were due in May, 1993. See 47 CFR §1.223(a). By then, May certainly should have known that his advice would be a significant

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issue in this case.<sup>1/</sup> May knew that the subject matter of the hearing was his client's abuse of a Commission rule. May knew that his job had been giving his client advice about that rule. May knew that he had only given that advice orally and without meaningful research. May knew that these facts would come out in the hearing. May certainly knew how and when to file a petition for leave to intervene. Yet when this case was designated, May failed to file such a petition.

Parties make plans for long term litigation based on their knowledge of the number and identity of each party they may reasonably expect to confront. That is why late intervention is disruptive and disfavored. In this instance, May's proposed intervention could not be more disruptive to the parties, a fact May apparently does not appreciate.<sup>2/</sup> Over a three year period, this case has been designated, tried, decided, appealed, and fully briefed. Any additional time spent considering May's arguments will even further delay this proceeding.

2. May has not shown that he could not have participated earlier. As noted above, May was well aware of the issues in this case and the likelihood that his advice would come under question. May was able to come forward at any time, but he voluntarily elected not to do so.

Interpreting Section 1.223 of its Rules, the Commission has held that a party seeking to intervene late must demonstrate "why it was impossible to file a petition [for leave to intervene] within the time prescribed" (emphasis

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<sup>1/</sup> May actually knew this as far back as May 10, 1991, when a Petition to Deny was filed by Dan Borowicz against NMTV's proposed acquisition of WTGI-TV. See Initial Decision, 10 FCC Rcd 12020, 12034 ¶97 (ALJ 1995). As soon as the Bureau opened an investigation of that transaction, May knew, or should have known, that (1) Trinity's defense was based on his advice; (2) the genuineness and credibility of his advice would be an issue in the investigation and in any subsequent proceedings, and (3) the Bureau was highly skeptical of the actions Trinity had taken based, supposedly, on his advice.

<sup>2/</sup> May never contacted SALAD to notify it of his desire to intervene or to seek its consent to such intervention.

supplied). Cosmopolitan Broadcasting Corp., 35 RR2d 920, 922 n. 2 (1975) ("Cosmopolitan") (denying the ACLU leave to intervene in a hearing three years late without good cause). May's timely intervention was hardly "impossible."<sup>3/</sup>

May states that his intervention was occasioned not by any finding of the ALJ, but by a pleading filed by a party: the Bureau's "Opposition to Motion to Vacate the Record on Improvidently Designated Issues", filed October 25, 1996. It is well established that a party's surprise that an issue was handled in a particular way in a hearing is not a sufficient reason for late intervention. Press Broadcasting Company, 3 FCC Rcd 6640 ¶5 (1988); see Committee for Community Access v. FCC, 737 F.2d 73, 84 (D.C. Cir. 1984) ("if we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission's - and indeed the public's - interest in finality of licensing decisions would be eviscerated.") However, May was not even surprised: he admits that he had notice of the Bureau's position on February 28, 1996, when the Bureau filed its "Consolidated Reply to Exceptions" ("Consolidated Reply"). See May Petition at 3. To explain why he did not seek to intervene in March, 1996, May offers only that he has

been informed that counsel currently representing NMTV and Trinity discussed these issues with the Bureau staff on several occasions in an attempt to convince the Bureau to change its position. I have been informed, however, that these discussions were unsuccessful, and the Bureau repeated those allegations in its opposition to Trinity's motion to vacate the record on improvidently designated issues.

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<sup>3/</sup> Both of the cases May relies on involved equities quite different from his own. In West Jersey, 89 FCC2d at 473, the Commission held that the intervening party "appears to have been out of contact with the Commission during the hearings. We have no reason at this point to believe this occurred for other than innocent reasons. Thus, [the party] was apparently unaware of the allegations made concerning him." In Quality, 4 RR2d at 867, the Commission held that the intervening party's "failure earlier to seek intervention was occasioned by circumstances beyond his control."

Declaration of Colby May, November 15, 1996 (appended to the May Petition) (hereinafter "May Declaration"), ¶¶7-8.

May's attempt to invoke these "discussions" as an excuse for his failure to timely seek intervention must be rejected. May nowhere maintains that the Trinity/NMTV/Bureau discussions occurred within the thirty day period after the Bureau's February 28, 1996 filing of its Consolidated Reply, or even that he attempted to participate in those discussions.<sup>4/</sup>

3. May lacks standing. Standing is perhaps the most important of [the jurisdictional] doctrines. FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-31 (1990) (citations omitted). Although administrative standing is more liberal than judicial standing, it is not so expansive that entirely speculative claims such as that of May are entitled to consideration.

May's statement of his claim of injury is this:

I am concerned that the Bureau's allegations adversely affect my reputation for truth and veracity, my standing before the Commission, and my ability to continue to earn a livelihood in the broadcasting industry.

May Declaration.<sup>5/</sup>

This is not a sufficient basis for standing. If every person whose financial prospects were affected by a Commission proceeding could intervene at any time as a full party in interest, there would be no end of permissive intervention.

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<sup>4/</sup> If these discussions could not have been concluded within thirty days after Bureau's filing of its Consolidated Reply, May should have filed a motion to extend the date for filing a petition to intervene pending the outcome of these discussions. He failed to do so.

<sup>5/</sup> SALAD assumes that May's reference to his "standing before the Commission" is inadvertent surplusage. As long as May is licensed to practice law in any state or in D.C., he automatically has "standing before the Commission" under 47 CFR §1.23. Apparently, then, May's real concern is with the detrimental impact the Bureau's supposed challenge to his professional reputation might have on his earning potential.

The Commission has almost no jurisdictional sway over May. He isn't a licensee, permittee, or a representative of listeners or viewers: he's just a communications lawyer. Nothing in the Act or the Rules authorizes the Commission to help communications lawyers make a living; indeed, nothing in the Act or the Rules even requires a party to have a communications lawyer or any lawyer. While the Commission's Rules provide for the participation of counsel and require counsel to have character and professional integrity, see 47 CFR §1.24, the Rules are silent on the quality of the advice an attorney must render. The quality of attorney advice is regulated by state authorities which license attorneys.

The Bureau has not sought May's disbarment, suspension or other sanctions. May is in little danger of Commission censure. He is not accused of any of the misdeeds for which the Commission sanctions attorneys, such as disrespecting a judge<sup>6/</sup> or committing multiple felonies.<sup>7/</sup>

Even if damage to one's earning potential were grounds for standing, May has not offered a shred of evidence showing that he has suffered any loss of earning potential. He has failed to produce one press clipping attacking his advice, one letter from a client terminating him, or one letter from a potential client refusing to retain him. He has not even offered an in camera proffer of such documents. Thus, his injuries are entirely speculative.

4. May's participation would interfere with the adjudication of the issues in this case. A lawyer's good name and potential earning ability is a side issue which can only detract from the far more serious issues already litigated in this case. In Opal Chadwell, 2 FCC Rcd 3458 ¶¶4-5 (1987) ("Chadwell"), the Commission considered whether to permit allegations

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6/ Benedict P. Cottone, Esq., 63 FCC2d 596 (1977) (one day suspension from FCC practice for courtroom behavior so vile it's almost amusing).

7/ Thomas L. Root, Esq., 67 RR2d 1156 (1990) (noting lawyer's disbarment on consent.)

of attorney misconduct to be heard in the case in which they arose or to be heard separately. Affirming the Review Board's dismissal of a lawyer's motion for leave to intervene and file exceptions, the Commission unequivocally expressed its preference for a separate forum for allegations of attorney misconduct:

We agree with the thrust of the Board's reasoning that questions of attorney conduct should not, except where necessary, be adjudicated in the course of an ongoing licensing proceeding. To do so might interfere with and unduly delay the resolution of the main issues in the licensing proceeding and could also deprive the affected attorney of an appropriate degree of due process...in the event that a question of alleged attorney misconduct is inextricably related to an issue under consideration in the licensing proceeding, decision makers should make only those findings of fact that are essential to the resolution of the applicants' qualifications. This may include incidental findings about the attorney's conduct if required to evaluate the conduct of an applicant. However, the decision maker should draw no conclusions about the ethical ramifications of the attorney's conduct in the decision....Upon receiving notification of alleged attorney misconduct, the Office of General Counsel will determine what further action would be appropriate.

Chadwell is on all fours with this case. The Initial Decision was faithful to Chadwell. May's Petition for Leave to Intervene should be denied for the same reasons the lawyer's petition in Chadwell was denied.

5. May has not proposed to add any new material facts to the record. May could hardly do so, since he has already testified in the hearing. May's proffered Comments identify no new facts of which the Commission is unaware. Instead, May's proffered Comments contain only his own, self-serving spin on facts of record. Compare West Jersey, 89 FCC2d at 473 (potential intervenor's testimony, which had not been available before, "may be of decisional significance"); Quality, 4 RR2d at 867 (potential intervenor's new testimony "appears to be of decisional significance"). "A repetitious recital of facts already elicited and amply considered by the Judge would not significantly aid the Commission." Cosmopolitan, 35 RR2d at 922.

6. May has already enjoyed any process due to him. May has already participated in this case -- as a witness. Thus, May has already had an ample opportunity, under oath, to defend the credibility of his advice. Compare West Jersey, 89 FCC2d at 471-72 (party seeking intervention had had no opportunity to testify at the hearing). May has not explained how, as a witness, he was unable to sufficiently defend the credibility of his own advice.

7. Five more appropriate venues than this proceeding are available to May. (1) May was free to ask the Bureau to change its position, and he did so. (2) May is also free to request a declaratory ruling under Section 1.2 of the Rules, a provision often invoked to "terminate a controversy or remove uncertainty,"<sup>8/</sup> and thus flexible and expansive enough to accommodate a request to exonerate a nonparty attorney for alleged misbehavior. (3) May is also free to "comment informally on the publicly available record." Fox Television Stations, Inc., 10 FCC Rcd 2954, 2956 ¶19 (1995). (4) If the Commission seeks to censure him, May will have every opportunity to be heard.<sup>9/</sup> (5) Finally, May can resort to the marketplace by showing his clients and potential clients evidence of the credibility of his legal advice in this and other cases.

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<sup>8/</sup> Fox Television Stations, Inc., 8 FCC Rcd 5341, 5343 ¶14 (1993) (subsequent history omitted) (citing 5 U.S.C. §554(e)).

<sup>9/</sup> 47 CFR §1.24(b) (providing that "before any member of the bar of the Commission shall be censured, suspended, or disbarred, charges shall be preferred [sic] by the Commission against such practitioner, and he or she shall be afforded an opportunity to be heard thereon.")

If the Commission reaches the merits of May's proffered Comments, it should summarily dismiss them as being wholly without merit. See Comments of Glendale Broadcasting, to be filed this date, with which SALAD concurs entirely. May, an experienced practitioner, had to know that the genuineness of NMTV's structure was the most critical fact the Commission would want to know about NMTV. May had to know that to be NMTV's "owners", NMTV's directors had to exercise genuine rights of ownership and not be rubber stamps for another board member who controls them. Nonetheless, May gave only oral advice to the contrary, without having conducted any serious research. He told Trinity exactly what it wanted to hear -- indeed, he simply validated what Crouch had already decided to do. Then May did nothing while Trinity went many steps beyond his purported advice by conducting a massive campaign of concealment and obfuscation. The record discloses nothing that May did to prevent Trinity from treating NMTV as a mere subsidiary. Indeed, May's law firm "treated TTI/MMTV as a TBN subsidiary rather than an independent corporate entity", Initial Decision, 10 FCC Rcd at 12060 ¶322 -- conduct all too consistent with May's own purported, offhand "legal advice."

The record also discloses nothing that May did to prevent Trinity from engaging in its campaign to conceal material facts. Indeed, May was Trinity's enabler and lieutenant in that campaign.

The Bureau's evaluation of May's testimony was absolutely correct. May's injuries, if any, were self-inflicted.

Respectfully submitted,



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December 17, 1996

**CERTIFICATE OF SERVICE**

I, David Honig, this 17th day of December, 1996, hereby certify that I have caused to be delivered to the following persons by U.S. First Class Mail, postage prepaid, the foregoing "Opposition to Petition of Colby May for Leave to Intervene, to File Comments, and to Participate in Oral Argument":

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