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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

January 13, 1997

VIA HAND DELIVERY

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

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) Reply in Support of Petition of Colby May for Leave to Intervene, to File Comments, and to Participate in Oral Argument, together with a Request for Leave to File the same; and

✓ (2) Reply Comments of Intervenor Colby May, together with a Request for Leave to File the same.

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
OFFICE OF SECRETARY

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

In re Applications of	)	MM Docket No. 93-75
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	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	)	

To: The Commission

REQUEST FOR LEAVE TO FILE REPLY COMMENTS OF INTERVENOR COLBY MAY

Petitioner Colby May hereby requests leave to file the attached reply comments in the above-captioned proceeding.

On November 15, 1996, Mr. May filed his Comments in Response to Mass Media Bureau's Opposition to Motion to Vacate the Record on Improvidently Designated Issues. On December 17, 1996, Glendale Broadcasting Company filed a sixty-page response to Mr. May's comments raising a significant number of issues and authorities. The public interest would thus be served by permitting Mr. May to file a ten-page reply.

Mr. May's request will not delay this proceeding. The voluminous pleadings already before the Commission require careful consideration. As has been noted by other parties,

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the elimination of the Review Board has deprived this proceeding of the kind of review previously afforded under the Commission's Rules.

Accordingly, Mr. May respectfully requests that the Commission grant him leave to file the attached reply comments.

Respectfully submitted,

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Barbara McDowell
Eric Grant
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(202) 879-3939

Counsel for Petitioner Colby May

January 13, 1997

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	)	

To: The Commission

REPLY COMMENTS OF INTERVENOR COLBY MAY

The Mass Media Bureau has offered no response on the merits to the Comments of Intervenor Colby May, who served as counsel to Trinity Broadcasting Network ("TBN") and National Minority TV, Inc. ("NMTV") in connection with the matters at issue here. The Bureau apparently cannot refute Mr. May's showing that he was, at a minimum, reasonable in advising his clients that minority ownership of a broadcast station was sufficient, in itself, to satisfy the minority exception to the multiple ownership rule.[1]

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[1] In its opposition to Mr. May's petition to intervene, the Bureau merely repeats, in wholly conclusory fashion, its allegations that Mr. May engaged in a "gross misreading of the multiple ownership rules." MMB Opposition to Petition of Colby May for Leave to Intervene at 3 ("MMB Opp."). Not only does the Bureau offer no support for this assertion, but the Bureau concedes that the similarly worded minority preference for low-power television *did* turn solely on minority ownership. *See id.* at 1-2 n.1.

Nor does Glendale Broadcasting Company ("Glendale") offer any persuasive response in its sixty-page opposition to Mr. May's principal argument—that his interpretation of the minority exception was at least reasonable, if not correct, given (i) the language and purpose of former 47 C.F.R. § 73.3555(d)(3)(C); (ii) contemporaneous commentary on the minority exception by the Commission and individual Commissioners; and (iii) the similarity between the minority exception to the multiple ownership rule and the minority preference for low-power television ("LPTV") lotteries, which the Mass Media Bureau concedes required minority ownership alone. Indeed, Glendale largely ignores Mr. May's arguments, instead invoking other statutory and regulatory provisions that are unrelated to § 73.3555.

Glendale also repeats various factual allegations that Mr. May's Comments did not address. But the supposed unreasonableness of Mr. May's advice, as a *legal* matter, is the essential predicate to virtually all of Glendale's arguments. These factual issues have, in any event, already received sufficient treatment by Trinity and NMTV. *See* Trinity Exceptions to Initial Decision at 9-31 (filed Jan. 23, 1996); Consolidated Brief and Exceptions of NMTV at 4-14 (filed Jan. 23, 1996); Comments of NMTV at 15-19 (filed Oct. 25, 1996).

DISCUSSION

1. Glendale concedes that in construing a statute or regulation such as § 73.3555, one must "start with the language of the statute or regulation to determine if the meaning is clear on its face." Opposition by Glendale to Comments on Behalf of Would-Be Intervenor at 55 (filed Dec. 17, 1996) ("Glendale Opp.") (citing *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953)). But Glendale then immediately ignores this acknowledged "groundrule" (*id.*) of statutory construction by asserting that, instead of relying on the plain and unambiguous text of § 73.3555(d)(3)(C), Mr. May should have concluded,

based on *other* Commission actions involving *other* statutes or regulations, that the Commission could not have meant what it said in § 73.3555(d)(3)(C). *See id.* at 55-56. This is not a proper approach to statutory construction. It is well established that any inquiry into the meaning of a statute or regulation is "complete" where, as here, the text itself is unambiguous. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also* Comments of Intervenor Colby May at 11-12 (filed Nov. 15, 1996) ("May Comments"). At a minimum, Mr. May was not unreasonable in relying on the plain language of § 73.3555(d)(3)(C).[2]

2. Glendale suggests that Mr. May should also have disregarded the canon of statutory construction that the specific takes precedence over the general, *see Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987), and thus should have relied not on the specific definition of "minority-controlled" in § 73.3555(d)(3)(C), but instead on the more general definition of "control" in Note 1 to § 73.3555. *See* Glendale Opp. at 17-18. As Mr. May's original Comments explained, however, even if one were (erroneously) to attempt to define "minority-controlled" by reference to Note 1, that would not support the result urged by Glendale and the Bureau. Instead, if Note 1 were applied according to its literal terms, a broadcast station would be "minority-controlled" *either* if minority-group members owned a majority of the shares of the station *or* if they exercised actual working control over the station. It would be unnecessary for the minority group members to pos-

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[2] Furthermore, in a notice of proposed rulemaking issued several months after the adoption of the minority exception, the Commission construed § 73.3555(d)(3)(C) in accord with its plain language:

> For purposes of these provisions, "minority-controlled" broadcast stations are defined as those in which more than 50% 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).

sess *both* de jure *and* de facto control. *See* May Comments at 14-16. Glendale offers no response to this argument.

3. Glendale purports to find support for its position in the Commission's notice of proposed rulemaking in *Reexamination of the Single Majority Stockholder and Minority Incentive Provisions*, 50 Fed. Reg. 27629, 27630 (1985) ("*Minority Incentive Reexamination*"), which stated that the minority exception would allow non-minority investors to serve as directors or officers of minority-controlled licensees as "a means short of majority stock control by which to ensure the continued viability of their investment." Glendale Opp. at 19 (quoting 50 Fed. Reg. at 27630). Glendale also cites Commissioner Rivera's concurring statement that the exception "exempts officers and directors from attribution where its standards are otherwise met." *Id.* (quoting same). But nothing in these statements suggests that the only roles that non-minorities could play are as directors or officers. The Commission did not preclude non-minorities from exercising any sort of interest in a "minority-controlled" station "short of majority stock control," *i.e.*, ownership.

4. Glendale does not dispute that Commissioner Patrick construed the minority exception to the multiple ownership rule in precisely the same way as did Mr. May. *See Amendment of Section 73.3555*, 100 FCC 2d 74, 103 (1985) (separate opinion of Commissioner Patrick); *see also* May Comments at 16-18. That fact alone would indicate that Mr. May's interpretation of the minority exception was reasonable, even if other Commissioners disagreed with that interpretation. In fact, however, no Commissioner disputed Commissioner Patrick's statement, both in his oral comments at the Commission meeting and in his subsequent written comments, that "[n]o concern is given [in the minority exception] as to whether the 51% minority owners will exert any influence whatsoever on the station's programming or will have any control at all." Transcript of FCC Open Meeting: Multiple

Ownership Item at 10 (Dec. 19, 1984), *in* Trinity Motion to Vacate, Tab 3; *accord* 100 FCC 2d at 104. Glendale does not even attempt to demonstrate otherwise.[3]

Moreover, Chairman Fowler—who, like Commissioner Patrick, viewed the minority exception as unwise—stated that he "agree[d] with Commissioner Patrick's comments. I think he has it exactly right." Transcript of FCC Open Meeting at 13. Since Commissioner Patrick's comments were largely focused on the failure of the minority exception to require actual control over programming as well as ownership, and since Chairman Fowler did not qualify his "agree[ment] with Commissioner Patrick's comments" in any respect, one could reasonably have assumed that Chairman Fowler concurred in Commissioner Patrick's interpretation of the minority exception as being based on ownership alone.[4]

5. Glendale largely ignores Mr. May's argument that the congressional and Commission purposes for according preferential treatment to minorities are served by construing the minority exception to turn on ownership alone. *See* May Comments at 22-26. At most, Glendale suggests that the Commission could not have intended the minority exception to be so construed, supposedly because minority ownership without actual working control

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[3] Glendale misunderstands Mr. May's discussion of Commissioner Rivera's statement at that meeting and subsequent written comments. *See* Glendale Opp. at 50-51. Mr. May did not, as Glendale asserts, contend that Commissioner Rivera opposed the minority exception. His point was simply that Commissioner Rivera did not disagree with Commissioner Patrick's interpretation of the minority exception as being based on ownership alone.

[4] Glendale concedes that former Chairman Wiley, in an analysis published shortly after the Commission's adoption of the minority exception, explained that "minority control occurs if minorities hold a greater than 50 percent *ownership* interest." Glendale Opp. at 52 (quoting Richard E. Wiley, *The Media and the Communications Revolution*, 231 PLI/Pat 421, 457 (Prac. L. Inst. Nov. 13, 1986) (emphasis by Glendale)). Glendale's only response is to assert that former Chairman Wiley said "ownership" when he meant "control." One could reasonably conclude from the quoted sentence, however, that former Chairman Wiley understood both that "control" is capable of different meanings and that, in the context of the minority exception, "control" meant ownership. The Wiley analysis thus provides further confirmation that Mr. May's advice was reasonable.

could not be expected to lead to diversity in programming. *See* Glendale Opp. at 13. But such a position disregards three significant points made in Mr. May's Comments.

First, as the Supreme Court noted in the *Metro Broadcasting* case, the Commission itself has determined that there is "an empirical nexus between minority *ownership* and broadcasting diversity." *Metro Broadcasting v. FCC*, 497 U.S. 547, 570 (1990) (emphasis added). So, too, has Congress. *See id.* at 579. Glendale offers nothing to refute the existence of the "nexus" found by Congress and the Commission between ownership and programming diversity.

Second, Congress and the Commission have sought to promote other goals, in addition to programming diversity, through their minority preference policies. These include facilitating the entrance of minorities into all aspects of the broadcast industry. *See Metro Broadcasting*, 497 U.S. at 593. Again, Glendale does not, and cannot, refute that this goal is served by a minority preference based on ownership alone.

Third, Congress and the Commission have sought to draft bright-line rules, which are "easy for applicants to comprehend and apply" and thus "easy for applicants to comply with." *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service*, 10 FCC Rcd 2907, 2914, 2915 (1995); *see also Multipoint Distribution Services*, 61 Fed. Reg. 67275, 67282 ("We seek to apply bright line attribution tests wherever possible."). Glendale has no response to Mr. May's argument that the Commission could have decided in the minority exception to impose a bright-line "ownership" rule rather than a more nebulous "ownership plus actual working control" rule.

At a minimum, therefore, Mr. May could reasonably have concluded that a minority exception based on ownership alone was fully consistent not only with the plain language of § 73.3555(d)(3)(C) but also with the Commission's policy goals.

6. A central premise of Glendale's argument is that Mr. May's advice was unreasonable because it would have been entirely unprecedented in 1985 for the Commission to adopt a provision that defined "control" solely in terms of ownership. *See, e.g.*, Glendale Opp. at 15. But that premise is refuted by the Mass Media Bureau itself, which concedes that in 1983 the Commission adopted a minority LPTV lottery preference that was based on ownership alone. *See* MMB Consolidated Reply to Exceptions at 2 (filed Feb. 28, 1996) (conceding that "mere ownership of more than 50% of [an LPTV] applicant was sufficient to support a minority preference claim"). Accordingly, contrary to Glendale's assertions, there was substantial relevant precedent in 1985 for defining "control" as ownership alone.

Glendale appears to disagree on the merits with the Bureau's interpretation of the LPTV minority preference. *See* Glendale Opp. at 12-15. But the correctness of that interpretation is irrelevant to the question whether Mr. May's advice was reasonable. The Bureau's own construction of the minority LPTV lottery preference as requiring "mere ownership" is, at the very least, reasonable. Mr. May, in agreeing with the Bureau, can hardly be viewed as giving unreasonable advice. Moreover, because the Commission used virtually identical language to define minority "control" for the minority LPTV lottery preference and for the minority exception to the multiple ownership rule, *see* May Comments at 19-20, 33-36, Mr. May's construction of the latter as requiring ownership alone was reasonable as well.

7. Glendale devotes much of its opposition *not* to § 73.3555 and the authorities advanced by Mr. May, but instead to the Commission's decisions under 47 U.S.C. § 310(d) regarding unauthorized transfers of control. But the Administrative Law Judge did not find a § 310(d) violation in his Initial Decision. Moreover, while he relied on decisions under § 310(d) in construing the minority exception in § 73.3555, those decisions do not purport

to address the proper construction of that exception, which, as we have shown, incorporates an entirely different standard based on ownership alone.

Section 310(d) is, in any event, plainly inapplicable where it is the president of the licensee who is exercising de facto control. None of the cases cited by Glendale involves this sort of situation—*i.e.*, one in which the alleged unauthorized "transferee" was the previously disclosed president of a corporate licensee who was simply directing the licensee's affairs as authorized by the corporate bylaws. It is, of course, common for the president of a corporate licensee to exercise considerable control over the licensee's operations; in fact, the Commission has accepted that the president of a corporate licensee may exercise "de facto" control over the licensee. *See, e.g., Metromedia, Inc.*, 98 FCC 2d 300 (1984) (holding that no change of control occurred where corporate president, who had exercised "de facto" control over corporate licensee for many years, obtained "de jure" control as well by acquiring licensee's stock). No authority suggests that the president or his company thereby risks violating § 310(d).[5] Indeed, if an unauthorized transfer of control occurred whenever the owner of a station was not exercising actual working control, then the Mass Media Bureau's concession that the minority owners of LPTV stations need not exercise such control would be meaningless.

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[5] The only Commission decisions cited by Glendale that involve corporate officers predate *Metromedia* and, in any event, are plainly inapposite. In *WHDH, Inc.*, 17 FCC 2d 856, 861-64 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 441 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), the licensee had failed to disclose to the Commission that the individual previously identified as its president had been replaced by another individual. In *Benjamin L. Dubb*, 16 FCC 274 (1951), the president, who originally had a minority stock interest in the licensee and who shared operating control with another individual, failed to disclose to the Commission that as a result of stock purchases by members of his family, he had acquired what was, in effect, a majority stock interest, which put him in sole operating control of the company. Glendale neglects to mention that, despite the lack of disclosure in *Dubb*, the Commission granted renewal of the license.

It cannot be disputed that the Commission was made aware of Dr. Crouch's position as president of NMTV. Mr. May disclosed that fact in NMTV's application to the Commission. Moreover, in response to inquiry by the Mass Media Bureau staff, Mr. May provided the Bureau with a copy of the NMTV bylaws, which delineated the scope of Dr. Crouch's authority as NMTV's president. After receiving these bylaws, the Bureau granted NMTV's application. *See* May Comments at 6, 26-27; Trinity Motion to Vacate at 64.[6]

8. Finally, Glendale suggests that Mr. May's advice is somehow suspect because his research in 1986-87 into the Commission's treatment of "control" in contexts other than the minority exception to the multiple ownership rule was not as exhaustive as Glendale's research a decade later. *See, e.g.*, Glendale Opp. at 41 n.8. No reason existed for Mr. May to conduct such research given the plain and unambiguous language of § 73.3555(d)(3)(C). In any event, the appropriate standard, as articulated in *Fox Television Stations*, 10 FCC Rcd 8452, 8486 (1995), *recon. denied*, 11 FCC Rcd 7773 (1996), is an objective one—what a "reasonable applicant" would have concluded in the circumstances based on the published authorities available at the time. It is thus appropriate to consider both those sources pertinent to the minority exception that counsel could have consulted as well as those that counsel actually did consult. As we have shown, this examination only confirms the reasonableness of Mr. May's construction of that exception.

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[6] As Trinity and NMTV have previously explained, no conceivable basis exists for Glendale's assertion that NMTV was a "sham." *See, e.g.*, Trinity's Proposed Findings of Fact and Conclusions of Law ¶¶ 40-175, 637-48 (filed Aug. 15, 1994); Trinity Reply Proposed Findings of Fact and Conclusions of Law ¶¶ 106-21; Trinity Exceptions to Initial Decision at 9-31 (filed Jan. 23, 1996); Consolidated Brief and Exceptions of NMTV at 4-14 (filed Jan. 23, 1996); Comments of NMTV at 15-19 (filed Oct. 25, 1996). Nor has the Mass Media Bureau so contended.

CONCLUSION

For the foregoing reasons and for the reasons stated in Mr. May's initial comments, the Commission should conclude that Mr. May's advice to his clients was reasonable, and that the Mass Media Bureau's allegations that Mr. May lacked candor with the Commission are without merit.

Respectfully submitted,

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January 13, 1997

CERTIFICATE OF SERVICE

I, Timothy B. Dyk of the law firm of Jones, Day, Reavis & Pogue, hereby certify that on this 13th day of January, 1997, copies of the foregoing Reply Comments of Intervenor Colby May, together with the foregoing Request for Leave to File the same, were hand delivered or sent by first-class mail, postage prepaid, to the following:

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