

FCC MAIL SECTION

Federal Communications Commission

FCC 98-313

~~APR 10 9 15 AM '99~~

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

In re Applications of	)	MM Docket No. 93-75
	)	
TRINITY BROADCASTING OF	)	File No. BRACT-911001LY
FLORIDA, INC	)	
	)	
For Renewal of License of	)	
Station WHFT(TV) on Channel 45,	)	
Miami, Florida	)	
	)	
and	)	
	)	
GLENDALE BROADCASTING	)	File No. BPCT-911227KE
COMPANY	)	
	)	
For a Construction Permit for a New	)	
Commercial TV Station to Operate on	)	
Channel 45, Miami, Florida	)	

### APPEARANCES

Nathaniel F. Emmons, Howard A. Topel, and Michael E. Lewin, on behalf of Trinity Broadcasting of Florida, Inc. and Trinity Broadcasting Network; Kathryn R. Schmeltzer and Gregory L. Masters, on behalf of National Minority TV, Inc.; Gene A. Bechtel and John J. Schauble, on behalf of Glendale Broadcasting Company; David Honig, on behalf of The Spanish American League Against Discrimination; Norman Goldstein, Gary P. Schonman, and James W. Shook, on behalf of the Mass Media Bureau Federal Communications Commission; and Timothy B. Dyk, Barbara McDowell, and Eric Grant on behalf of Colby May.

### DECISION

Adopted: November 24, 1998 ; Released: April 15, 1999

By the Commission: Chairman Kennard and Commissioner Tristani issuing a Joint Statement; Commissioners Furchtgott-Roth and Powell dissenting in part and issuing a Joint Statement.

---

**TABLE OF CONTENTS**

	<b>Paragraph</b>
<b>I. INTRODUCTION</b>	1
<b>II. BACKGROUND</b>	2
<b>III. SETTLEMENT AGREEMENT</b>	10
<b>IV. ISSUES REGARDING TBF</b>	
A. De Facto Control	
Background	14
Initial Decision	25
Exceptions and Discussion	35
B. Abuse of Process	
Initial Decision	75
Exceptions and Replies	77
Discussion	82
<b>V. ISSUES REGARDING GLENDALE</b>	
Misrepresentation and Lack of Candor	
Initial Decision	103
Exceptions and Replies	115
Discussion	117
<b>VI. CONCLUSION</b>	128
<b>VII. ORDERING CLAUSES</b>	129

## **I. INTRODUCTION**

1. In this decision, we affirm the initial decision in this proceeding in part by denying the renewal application of Trinity Broadcasting of Florida, Inc. and reverse the initial decision in part by denying the mutually exclusive application of Glendale Broadcasting Company. We conclude that the principals of both applicants committed serious misconduct. We also reject a settlement submitted in this proceeding.

## **II. BACKGROUND**

2. Trinity Broadcasting of Florida, Inc. (TBF) seeks renewal of its license to operate station WHFT(TV), Channel 45, Miami, Florida, and Glendale Broadcasting Company

(Glendale) has filed a mutually exclusive construction permit application for this facility. In addition to the standard comparative issue, the hearing designation order in this proceeding specified issues concerning TBF's basic qualifications. Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475 (1993). These issues relate to the activities of TBF's "parent," Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network (TBN). Because TBF and TBN have common officers and directors, TBN's activities bear on TBF's qualifications.

3. The designated issues concern the relationship between TBN and an entity called National Minority TV, Inc. (NMTV),<sup>1</sup> a licensee of full power and low power (LPTV) television facilities and television translators. In 1991, NMTV filed an application to acquire station WTGI(TV) in Wilmington, Delaware. A petition to deny filed against the Wilmington assignment application alleged that NMTV is not, as represented, a minority-controlled corporation, but is instead controlled by TBN. The issues designated in this proceeding inquire into whether TBN has exercised de facto control over NMTV and whether the principals of TBN and NMTV abused the Commission's processes by using NMTV (1) to evade the Commission's limitations on multiple ownership, and (2) to improperly claim minority lottery preferences with respect to LPTV applications.

4. Following designation, the presiding Administrative Law Judge (ALJ) added an issue concerning Glendale's basic qualifications. Trinity Broadcasting of Florida, Inc., FCC 93M-469 (Jul. 15, 1993). This issue involves the activities of Raystay Company (Raystay), which is wholly owned by Glendale's majority stockholder. The issue inquires whether Raystay made misrepresentations or lacked candor in seeking the extension of several LPTV construction permits.

5. Administrative Law Judge Joseph Chachkin found that TBF was unqualified to be a Commission licensee and granted Glendale's application for a construction permit. Trinity Broadcasting of Florida, Inc., 10 FCC Rcd 12020 (ALJ 1995). The ALJ found that TBN exercised de facto control over NMTV and abused the Commission's processes by using NMTV to subvert the Commission's minority ownership policies. 10 FCC Rcd at 12057 ¶ 304, 12060 ¶ 323. According to the ALJ, TBN did so by using NMTV to circumvent the provisions of 47.3555(e)(1), which limited to 12 the number of television stations that may be commonly owned if they are not minority-controlled.<sup>2</sup> (The rule permitted the ownership of

---

<sup>1</sup> NMTV was formerly called Translator TV, Inc. (TTI). In the interest of simplicity, we will refer to both entities as NMTV, unless we find that the context requires us to differentiate between the two names.

<sup>2</sup> Subsequent assignments reduced the number of TBN-related stations to 12. 10 FCC Rcd at 12040 ¶ 136. More recently, Congress, in the Telecommunications Act of 1996, mandated that the Commission eliminate limitations on the number of television stations that

14 stations if at least two were minority-controlled.) *Id.* at 12061 ¶ 329. The ALJ found that between February 1987 and December 1991, TBN's president Paul 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, which the ALJ deemed Crouch's alter ego, asked the Commission to allow Crouch to acquire an attributable interest in a 13th or 14th full power commercial television station. The ALJ held that 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. *Id.* at 12061 ¶ 329. The ALJ also found that TBN used NMTV to claim unwarranted lottery preferences in connection with LPTV and translator applications. *Id.* at 12060 ¶ 326.

6. In this regard, the ALJ found that TBN's principals were aware that NMTV was not minority-controlled and that they deliberately concealed material facts regarding NMTV's control from the Commission. *Id.* at 12061-62 ¶¶ 330-32. The ALJ found that it was not credible that TBN understood the Commission's minority ownership rules to require only de jure control since it was clear that the Commission never intended to abandon its long-standing practice of considering both de jure and de facto control in determining compliance with the multiple ownership rules. *Id.* at 12061 ¶ 328. Further, the ALJ rejected TBN's attempt to mitigate its principals' conduct by arguing that they relied on communications counsel who advised that NMTV qualified as a minority controlled entity. He found that the blame for the creation of the 'sham' corporation, NMTV, and its subsequent use as a vehicle to abuse the Commission's processes rested squarely with Crouch. According to the ALJ, NMTV was the brainchild of Crouch to take advantage of the Commission's minority ownership policies and Crouch admitted that he understood NMTV's entitlement to the minority exception to the 12 station ownership limit was uncertain. In the ALJ's view, instead of putting all of the facts before the Commission and obtaining a ruling, as he knew he should, Crouch voluntarily chose to hide behind an opinion of counsel that allowed him to do what he intended to do. *Id.* at 12062 ¶ 332. The ALJ concluded that "[t]he 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 . . . . Crouch's invention of . . . 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." *Id.* at 12060 ¶ 324.

---

can be owned nationwide, subject to an audience limit that is not exceeded here. Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996), § 202.

7. The ALJ exonerated Glendale of any misconduct. 10 FCC Rcd at 12062-63 ¶ 335, 12065 ¶ 349. He rejected allegations that an exhibit accompanying Raystay's two applications for extensions of time to construct LPTV facilities falsely represented the progress that had been made toward construction of the stations. He found that Raystay forthrightly admitted that actual construction had not commenced and accurately depicted the preliminary steps that had been taken. *Id.* at 12063-63 ¶¶ 338-48.

8. Now before the Commission<sup>3</sup> are exceptions and reply exceptions.<sup>4</sup> TBF and TBN, jointly, and NMTV filed exceptions to the ALJ's treatment of both TBF's and Glendale's qualifications. The Mass Media Bureau supports the disqualification of TBF but urges that Glendale should also be disqualified. Glendale supports both aspects of the Initial Decision. SALAD supports the disqualification of TBF. Additionally, TBF, TBN, NMTV, and SALAD have submitted a Joint Requests for Approval of Settlement Agreement. As described more fully below, under the terms of the proposed settlement TBF's application for license renewal would be granted and Glendale's application would be dismissed, as would SALAD's petition to deny.

---

<sup>3</sup> These pleadings were originally filed with the Commission's Review Board. Before it ceased operation, the Board certified this case to the Commission. Trinity Broadcasting of Florida, Inc., 11 FCC Rcd 5255 (Rev. Bd. 1996).

<sup>4</sup> In addition to TBF, the Bureau, and Glendale, the hearing designation order made TBN and NMTV parties, as well as The Spanish American League Against Discrimination (SALAD), which had filed a petition to deny against TBF. 8 FCC Rcd at 2481 ¶ 44. Colby May, an attorney to TBF, TBN, and NMTV, filed a petition for leave to intervene, to file comments, and to participate in oral argument. See 47 C.F.R. § 1.223(c). May's asserted interest in intervening is that the ALJ and the Bureau made adverse findings as to his conduct in advising his clients. We have in the past permitted individuals to intervene to defend their reputation where: (1) earlier failure to seek intervention was occasioned by circumstances beyond petitioner's control; (2) the evidence offered appeared to be of decisional significance; and (3) the decision in the proceeding may have had a direct bearing on petitioner's reputation and future ability to earn a livelihood in the broadcast industry. See West Jersey Broadcasting Co., 89 FCC 2d 469, 472-73 ¶ 10 (1980). Here, May's failure to anticipate adverse findings concerning him does not justify his failure to seek intervention earlier. Moreover, since the hearing has concluded, he can effectively be heard as an amicus. We have considered his proffered comments as an amicus brief.

9. We will affirm the Initial Decision in part and reverse it in part.<sup>5</sup> We agree with the ALJ that TBN does control NMTV and conclude that there has been deliberate abuse of the Commission's processes. We disagree, however, with the favorable findings made by the ALJ concerning Raystay's extension applications. We conclude that these documents reflect a lack of candor attributable to Glendale and that Glendale should be disqualified on this basis. Because we conclude that TBF's application for renewal of license should be denied, we will deny the Joint Requests for Approval of Settlement Agreement, which are premised on a grant of TBF's application.

### III. SETTLEMENT AGREEMENT

10. The settlement agreement submitted in this proceeding contemplates the resolution not only of this proceeding but of four other comparative renewal proceedings involving TBN-related stations. In MM Docket No. 93-156, Glendale has challenged the license of a TBN affiliate for station WHSG(TV), Monroe, Georgia. Additionally, Maravillas Broadcasting Company (Maravillas), an entity in which Glendale's principal George Gardner is also involved, has challenged TBN-affiliated licenses for WTBY(TV), Poughkeepsie, New York, and KTBN-TV, Santa Ana, California, and NMTV station KNMT(TV), Portland, Oregon. The latter three stations have not yet been designated for hearing. As to the Santa Ana station, another applicant, Simon T entered into a separate settlement agreement with TBN. That agreement was referred to the Bureau for consideration, since the Santa Ana proceeding has not been designated for hearing and the settlement was not conditioned on the outcome of this proceeding. Trinity Broadcasting of Florida, Inc., FCC 98I-38 (Sept. 9, 1998).

11. The settlement calls for the renewal of the various licenses and the dismissal of the Glendale and Maravillas applications. Glendale and Maravillas would receive a total of \$55 million in return for the acquisition of their stock by TBN. A related settlement calls for the dismissal of SALAD's petition to deny against TBF. (Settlements submitted in the other proceedings deal with further petitions to deny.) In return TBN would provide \$100,000 to establish two need-based scholarship funds for students of Miami-Dade Community College or another Florida institution of higher learning. TBN would also pay \$143,500 in partial

---

<sup>5</sup> While the exceptions were pending, TBF filed a Motion to Vacate the Record on Improvidently Designated Issues, arguing that new information warrants setting aside the designation order in this proceeding. The motion, however, consists mainly of arguments concerning matters that were considered at the time of designation or that have already been developed in the hearing record in this proceeding and which we have taken into consideration in reviewing that record. We see no reason to revisit the designation order. We believe that our decision here adequately and appropriately disposes of the questions raised.

reimbursement of SALAD's legal expenses.

12. The parties contend that approval of the settlement would serve the public interest by resolving protracted and burdensome litigation and that none of the parties filed their applications for the purpose of settling. They further contend that good cause exists for waiving the limits on reimbursement contained in the Commission's rules regarding the settlement of comparative renewal proceedings.

13. The Mass Media Bureau opposes the settlement, which is effectively conditioned on the grant of TBF's license renewal application for station WHFT(TV), because the Bureau believes that TBF is not qualified and that its application should be denied. We agree that the settlement can be approved only if TBF is found qualified to receive such a grant, since the Commission's policy of encouraging settlements does not extend so far as to justify the approval of a settlement agreement if that would result in the grant of a license to an unqualified applicant. See Mobiletel, Inc., 107 F.3d 888, 896 (D.C. Cir. 1997), citing Kannapolis Television Co., 1 FCC Rcd 1037, 1039 ¶ 18 (1986). Accordingly, we now turn to the issue of TBF's qualifications, as well as those of Glendale.

#### IV. ISSUES REGARDING TBF

##### A. De Facto Control

##### Background

14. TBN is a nonprofit, non-stock corporation founded in 1973 by Paul Crouch (Crouch), its president, chief executive officer, and chairman of the board. Under Crouch's leadership, TBN acquired KTBN-TV, Santa Ana, California, in 1974, and in subsequent years, Crouch formed corporations to acquire other full power television stations. Crouch typically serves as the president and a director of each licensee -- which Crouch considers as "owned and operated" by TBN. TBN's corporate counsel, Norman Juggert (Juggert), also typically serves as an officer and director of TBN-affiliated entities. TBN was organized to provide religious programming, and TBN-affiliated stations carry TBN's programming, which TBN offers 24 hours a day, in addition to any local programming. 10 FCC Rcd at 12021 ¶¶ 8-10.

15. Pearl Jane Duff (Duff), an African-American woman, began her association with TBN in 1979 as a volunteer. Crouch, wishing to integrate minorities into TBN's management, swiftly promoted Duff, who rose quickly through TBN's ranks. By the end of 1980, Duff served as TBN's public affairs director, vice president, and one of its three directors. In 1981, she became "assistant to the president," the second highest management office in TBN's hierarchy. 10 FCC Rcd at 12021-22 ¶¶ 13-14. Duff testified that her responsibilities involved TBN's legal affairs, public affairs, and station acquisitions. She indicated that she reviewed all FCC applications and was TBN's day-to-day contact with

communications counsel. She was responsible for all of TBN's translator applications. As of 1993-1994, TBN had approximately 150 translators and she had prepared and filed 48 applications during the most recent LPTV window. She had a wide range of additional duties and was "the primary TBN representative at various industry functions." *Id.* at 12022 ¶ 14. In addition, Duff had been a salaried employee of TBN since 1979, but never received a salary or any other form of compensation from NMTV. *Id.* at 12022 ¶ 15.

16. NMTV, then called TTI, was formed in 1980, shortly after the Commission adopted a notice of proposed rulemaking on September 9 concerning the future of LPTV and translators. Low Power Television Broadcasting, 82 FCC 2d 47, 75 (1980). The notice proposed giving preferences to minority-controlled applicants in awarding licenses for these facilities. On September 11, 1980, two days after the NPRM was adopted, Crouch conceived the idea of forming a new corporation to develop a network of translators that would carry TBN programming. He envisioned TTI as a minority-controlled corporation that would be used to take advantage of the minority preference, while TBN would acquire unbuilt and existing stations. He chose Duff to join him on the board of directors and enlisted her aid in finding another minority to serve as a third board member. Ultimately Crouch asked Phillip David Espinoza (Espinoza), a pastor and TBN program host, who is Hispanic, to join him and Duff on the board. (Espinoza resigned in 1990 and was replaced by Phillip Russell Aguilar, a pastor with previous connections to TBN, who is also Hispanic. In 1991, an African-American, Edward Victor Hill, another pastor with TBN connections, was added as a fourth director. When Aguilar resigned in 1993, he was replaced by Armando Ramirez, an Hispanic, TBN-related pastor.) Juggert drafted the necessary organizational documents and, on September 16, 1980, TTI was incorporated. Crouch became president of TTI and Duff vice president. 10 FCC Rcd at 12022-23 ¶¶ 17-22, 12036-38 ¶¶ 112-15, 119-20, 124-25.

17. Between November 6, 1980 and January 6, 1981, TTI filed 17 applications for television translator facilities. Because the Commission later imposed a freeze on the acceptance and processing of applications, no action was taken on the applications. In 1983, the Commission adopted new rules allowing the use of lotteries to select among certain competing applications (Random Selection Lotteries, 93 FCC 2d 952 (1983)), and in February 1984, TTI, on the advice of TBN's communications counsel, Colby May (May), certified that it was entitled to a full minority preference for its applications. Of the original applications, only that for Houston, Texas was granted, and this did not occur until 1988. 10 FCC Rcd at 12024-26 ¶¶ 25, 35, 39, 43; MMB Exh. 180. During the pendency of TTI's applications, it did not have its own bank account, and, while TBN raised considerable sums of money for building translators, little was credited to TTI. Inexplicably, despite TTI's lack of active operations, TBN's accounting department charged TTI with intercompany accounts payable, leading to a negative fund balance of over \$200,000. *Id.* at 12025 ¶¶ 31-33.

18. Meanwhile, TBN-related telecommunications interests underwent a rapid

expansion. By 1984, Crouch, Juggert, and Duff were directors of companies owning seven full power television stations, the maximum allowed by the Commission's rules at that time. TBN also entered into agreements for the carriage of its programming on cable systems and other television stations and began loaning money to other religious broadcasters. Crouch also organized a corporation called Community Educational Television, Inc. (CET) to acquire educational stations, as well as companies to acquire foreign stations. At the same time, TBN (but not TTI) began to purchase the construction permits of unbuilt LPTV and translator stations. During this period, Duff resigned as an officer and director of TBN. She continued, however, to serve in those capacities with TTI, CET, and the foreign companies. She also remained as assistant to the president of TBN with duties including overseeing TBN's LPTV and translator operations. 10 FCC Rcd at 12021-22 ¶ 14, 12026-28 ¶¶ 44-45, 48, 51-53. When NMTV secured full power TV stations, she was put in charge of those operations. *Id.* at 12057-58 ¶ 307.

19. In 1985, pursuant to the Commission's modified multiple ownership rules, Amendment of Section 73.35555, 100 FCC 2d 74 (1985),<sup>6</sup> TBN acquired additional stations, until it reached the rules' new numerical limit of 12. The ALJ found that no consideration was given as to whether TTI should acquire any of these full power commercial television stations. 10 FCC Rcd at 2028 ¶ 55. Sometime in 1986, Crouch learned that a long-time TBN programmer wished to sell the construction permit for an unbuilt full power television station in Odessa, Texas. Communications Counsel Colby May advised Crouch and Duff that TTI could acquire the station, since the new multiple ownership rules permitted commonly held attributable interests in up to 14 stations, if at least two were minority-controlled.<sup>7</sup> TTI

---

<sup>6</sup> Specifically, on February 1, 1985, the FCC issued a Memorandum Opinion and Order amending its multiple ownership rules by permitting owners to hold cognizable interests in up to 12 TV stations. In addition, a group owner could hold cognizable interests in up to 14 stations if two of the stations were minority controlled. Minority controlled was defined as more than 50 percent owned by one or more members of a minority group. The Memorandum Opinion and Order did not discuss the concept of de facto control, nor did it change Note 1 to Section 73.3555, which reads as follows:

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

<sup>7</sup> The ALJ found that May asserted that he based this advice on his reading of Amendment of Section 73.3555 and the resulting rule, but did no other research. In May's view, TTI's legal standing and the racial and ethnic identity of its three board members were the crucial factors which would allow TBN and TTI to qualify for the multiple ownership exceptions to the rule of 12. May was aware that under Note 1 control is not limited to

applied for assignment of the Odessa permit and changed its name to NMTV, in recognition of the fact that it was no longer concerned exclusively with LPTV and translator stations.<sup>8</sup> *Id.* at 12028-29 ¶¶ 54-57, 63.

20. The ALJ found that although May insisted that he received no special instructions from Crouch concerning disclosures to be made about NMTV and TBN's relationship, he also claimed that Crouch made it clear to him that Crouch wanted complete and open disclosure of all factors which would show that NMTV was a minority controlled company. (10 FCC Rcd at 12030 ¶ 64. Crouch testified " . . . I said, put everything on the record, make it clear to the agency what the relationship between NMTV and Trinity Broadcasting is, divulge everything, put everything on the record, file it with the Commission. If they pass on it and approve it, fine, our goal was to acquire as many stations and network affiliates as we possibly could." *Id.* at 12030 ¶ 65. The ALJ found, however, that notwithstanding Crouch's testimony, none of NMTV's applications seeking a minority exemption including the Odessa assignment application signed by Crouch disclosed to the Commission information about Duff's relationship with TBN or NMTV's relationship with TBN. The ALJ found that Crouch was unable to offer a credible justification for that omission and that he ultimately sought to retract his earlier damaging testimony and place the onus on May for any failure to inform the Commission. In this regard, Crouch stated, "...what I instructed my counsel to do

---

minority stock ownership but includes actual working control. However, May claimed he paid no attention to Note 1 or Commission precedent interpreting Note 1. He asserted that in his mind control and ownership are functionally the same in the case of a non profit entity and the exception to the Rule of 12 was satisfied where the minority group constituted more than 50 percent of the directors. However, May agreed that neither Crouch nor TBN could legally exercise actual working control over NMTV as that term is used in Note 1, and he advised Crouch that the directors of NMTV had to be the parties that were, in fact, controlling and operating NMTV. 10 FCC Rcd at 12029 ¶ 57.

<sup>8</sup> Duff sent the purchase agreement to the seller, along with a transmittal letter prepared on TBN stationery, signing the letter as assistant to the president, her TBN title. Similarly, Duff's transmittal letter to May accompanying the FCC application for the station's transfer was prepared on TBN stationery and she signed it as assistant to the president (of TBN). In addition, there was no evidence that at the time the agreement was executed, NMTV's board had considered (much less approved) the purchase or discussed financing for the acquisition or construction of the station. 12 FCC Rcd at 12029 ¶ 60. A written authorization was subsequently issued by the NMTV board. At the January, 1987 board meeting of all of the TBN-related companies, TBN's board authorized TBN to spend up to \$3 million to acquire low power television construction permits and stations. The minutes are silent about TTI's pending contract to buy a full power television station for Odessa. *Id.* at 12029 ¶ 61.

was to file and put on the record *everything he felt necessary to put on the record*. (Emphasis supplied by ALJ). The ALJ concluded that "Crouch's belated attempt to place the onus on his counsel is not credible and is rejected." Id.

21. The Commission granted the Odessa application on June 9, 1987. The Odessa station began operation by mid-October 1988, as a TBN affiliate. It originated no local programming. During the time NMTV held the license for the Odessa station, Duff and Ben Miller, TBN's chief engineer, supervised the station's management. They both performed their NMTV-related activities during their normal TBN workdays. Despite the objections initially voiced by Duff and the third NMTV director, Espinoza, Crouch, within a matter of months, the board authorized Crouch to look for a buyer for the Odessa station. In 1989, NMTV's board authorized sale of the station to permit NMTV to acquire a station in a larger market. (NMTV had, by that time, acquired a Portland station as discussed below, thereby reaching the overall limit of 14 TBN-related stations.) In 1991, the Odessa station was sold for \$650,000 in installments to Prime Time Christian Broadcasting, Inc. (Prime Time), which continued to operate the station as a TBN affiliate. The sale price was more than \$100,000 below NMTV's construction costs. When, in early 1993, it became apparent that Prime Time could not discharge its debt to NMTV, NMTV's board voted to forgive the debt. The ALJ found that without the debt to NMTV, Prime Time could expand its operations by building translators that would extend coverage of its principal station in Roswell, New Mexico and KMLM(TV) in Odessa. Prime Time's Roswell station was also a TBN affiliate. Crouch understood that, at least financially, NMTV's action benefitted TBN but not NMTV. In this connection, NMTV made no effort to recover the station's physical assets being held as security by NMTV and to sell them independently. Such action would have forced the station off the air and deprived TBN of an outlet for its programming. 10 FCC Rcd at 12030-32 ¶¶ 66, 73-77, 80.

22. Even before the Odessa assignment had been granted, Crouch and Duff were exploring the possibilities for acquiring a 14th TBN-related station. Duff learned in October 1987 of an available unbuilt construction permit in Portland, Oregon. The ALJ found that NMTV, rather than TBN sought to acquire the station because TBN had its full complement of stations. The purchase price was \$520,000, although TBN's financial records showed that NMTV had cash and capital assets of less than \$290,000, while its liabilities exceeded \$600,000. Nonetheless, none of the NMTV directors felt any concern about acquiring the Portland station while the company was in debt because each understood that TBN would provide whatever funds were necessary to buy and build the station. The Commission approved the assignment of the station to NMTV about a year later, and the station began

operation in November 1989 as a TBN affiliate.<sup>9</sup> The station began broadcasting three local programs in 1992. With Crouch's concurrence, Duff hired Jim McClellan, a TBN employee, to be the Portland station manager and hired another TBN employee, Mark Fountain, to be the station's chief engineer. 10 FCC Rcd at 12030-34 ¶¶ 67-68, 81-82, 88-91.

23. As noted above, Crouch and Duff were also investigating alternatives to operation in Odessa in order to enter a larger market. Crouch had also learned in 1987 of the possibility of acquiring a station in Wilmington, Delaware. The ALJ found that, in 1987, at a time when NMTV did not even have a bank account, the purchase proposal reflected that NMTV offered more than \$4 million for the station's equipment plus additional sums for the station's land. While Espinoza claimed that he and Duff discussed in 1987 the possible purchase of a station in Wilmington, there are no contemporaneous board minutes or resolutions regarding the Wilmington proposal. Crouch resumed investigation of the station in late summer or autumn of 1990, and in March 1991, after discussing the matter at NMTV's annual meeting, submitted the winning bid for the station in a bankruptcy proceeding. Crouch and Alan Brown, TBN's head of finance, signed, on behalf of NMTV, a check for \$400,000 to cover the deposit for the Wilmington station. At the time Brown signed the NMTV check, he was not an officer of NMTV. TBN's 'Praise the Lord' newsletter in May 1991 said, "we signed the agreement and deposited the down payment for the FULL POWER CHANNEL 6 serving the great Wilmington, Delaware - Philadelphia, Pennsylvania area! Praise the Lord! This will be, God willing, and the FCC approving, a National Minority TV station (of which I am President) working in full affiliation with your TBN." Crouch also made an appeal for funds to pay for the station. By September, TBN had received \$37,000 in contributions for the purchase of the station; NMTV had received none. A petition to deny filed against NMTV's assignment application for the Wilmington station raised an issue of whether NMTV was controlled by TBN, and, on September 13, 1991, the Commission directed a letter of inquiry to NMTV. NMTV thereupon dismissed its assignment application. 10 FCC Rcd at 12031, 12034-34 ¶¶ 68, 92-95, 97-100.

24. At the same time that NMTV was involved in the acquisition of full power television stations, it continued to apply for LPTV and translator stations. Of four LPTV applications filed in July 1987, the Commission granted one, in Fresno, California. NMTV also filed applications in June 1988, March 1989, December 1989, May 1991, and April 1993.

---

<sup>9</sup> The ALJ found that May copied the information contained in NMTV's portion of the assignment application for the Portland permit from the comparable portion of NMTV's application for Odessa. Although the application references translator applications filed by TTI in which it had been stated that Duff was then a director of TBN and reveals that both Crouch and Duff had interest in two [noncommercial] stations and the NMTV station in Odessa, the application provides no information about Duff's or NMTV's relationship with TBN. 10 FCC Rcd at 12033 ¶ 85.

During this period, Duff directed TBN's LPTV/translator operations. NMTV's LPTV and translator stations broadcast TBN programming. 10 FCC Rcd at 12035-36 ¶¶ 101-106.

### Initial Decision

25. The ALJ found that TBN exercised de facto control over NMTV. He found that NMTV "at all relevant times has marched in absolute lockstep with TBN." 10 FCC Rcd at 12057 ¶ 304. He based this conclusion on an analysis of six factors derived from Commission precedent:<sup>10</sup> (1) purpose, (2) corporate composition, (3) finances, (4) personnel, (5) programming, and (6) representations to the public. *Id.* at 12057 ¶¶ 303-04. Trinity had argued that 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. The ALJ did not agree with Trinity's proposition that this is the ultimate question. In any event, he found that Trinity failed to show that Duff was independent. 10 FCC Rcd at 12059 n. 41.

26. The ALJ found that NMTV's purpose was "nothing more" (10 FCC Rcd at 12057 ¶ 306) than to carry out TBN's mission of spreading the gospel over the airwaves by permitting the acquisition of stations that TBN would otherwise not be eligible to acquire. He observed that NMTV's articles of incorporation and bylaws make no reference to minority control and are no different from TBN's governing documents and those of TBN's "owned and operated" stations. He also found that, despite claims that NMTV would ultimately "break away" from TBN, NMTV remains totally dependent on TBN for money, supervision, and overall direction, and that no plan for independence has ever been developed.

27. The ALJ also found that this purpose was reflected in NMTV's corporate composition as embodied by its board of directors. He found that Crouch has always served as NMTV's president and one of its three directors. He further found that Crouch installed as NMTV's second director, Duff, who also held TBN's second highest management position, and had prominent and varied responsibilities with TBN in that capacity. He noted that Duff receives no remuneration from NMTV; her income comes solely from her services for TBN. According to the ALJ, the criterion for selecting the third NMTV director, Espinoza and his successors, in addition to minority status, was past loyalty to TBN. The ALJ found that these third directors lacked knowledge of and involvement in NMTV's affairs. For example, the ALJ found that "Espinoza never performed the duties of chief financial officer. Essentially, what Espinoza understood was that TTI/NMTV was separate from TBN only in that TTI/NMTV could take advantage of certain Commission policies pertaining to minority

---

<sup>10</sup> See e.g., Arnold L. Chase, 6 FCC Rcd 7387, 7409 (ALJ 1991), citing, Benjamin L. Dubb, 16 FCC 274, 288 (1951); Southwest Texas Broadcasting Council, 85 FCC 2d 713, 715 (1981).

ownership; otherwise, TTI/NMTV was simply another vehicle for TBN programming." 10 FCC Rcd at 12036 ¶ 111. The ALJ found that Edward Victor Hill was more active than others, but that "Hill like his fellow directors, voted to forgive Prime Time's debt to NMTV, [but] there is no indication that he has ever pressed TBN to forgive NMTV's debt which arose from the construction and operation of the Odessa station." *Id.* at 12037-38 ¶ 122. Such an action would have been reasonable for a director acting in a fiduciary capacity for NMTV. The ALJ concluded that control lay firmly in the hands of TBN's Crouch and Duff. *Id.* at 12057-58 ¶¶ 307-08.

28. The ALJ found that TBN totally dominated NMTV's finances. He found that TBN's paid employees, consultants, and attorneys prepared NMTV's applications and did not bill NMTV. From 1980 to 1987, NMTV did not maintain a separate bank account. Its finances were handled by TBN personnel and reflected as part of TBN's consolidated financial report. In these reports, TBN's revenues and expenses relating to LPTV and translator matters were allocated to NMTV without regard to NMTV's actual activities. No one questioned why NMTV had a large negative fund balance during those years, even though it was not actively engaged in any business activities since its pending applications had not yet been acted on. 10 FCC Rcd at 12058 ¶¶ 309-11.

29. Until 1992, TBN advanced money to NMTV to acquire full and low power facilities without requiring any promissory note, interest, security, or repayment terms. In this regard, TBN treated NMTV as it did its "owned and operated" stations. By contrast, TBN required formal notes and terms when it loaned money to autonomous entities. 10 FCC Rcd at 12058 ¶¶ 312-13.

30. The ALJ also found significant evidence of TBN's financial domination of NMTV in circumstances involving the Odessa station. Although NMTV had borrowed over \$750,000 from TBN to construct the Odessa station, it was willing to sell the station to Prime Time for \$650,000. Later, when Prime Time expressed concern that it would go bankrupt, NMTV simply wrote off the debt. To the ALJ, this meant that NMTV had no real financial stake in this matter, since TBN would simply fund any activity in its own interest. The ALJ found that, in this case, the only concern was to preserve Odessa as an outlet for TBN programming. The ALJ contrasted the situation in Odessa with the situation in Portland. He found that in Odessa, NMTV did not construct a studio to originate local programming because TBN did not consider it worthwhile, whereas a studio was built in Portland because TBN considered construction in its interest. 10 FCC Rcd at 12058-59 ¶¶ 314-16.

31. The ALJ also examined the overlap between NMTV's personnel and TBN's. Of NMTV's directors, Crouch has always been an officer and director of TBN and has received his salary from it. Duff also served as an officer and director of TBN. Even after she terminated those roles, she remained a salaried employee of TBN. NMTV has never had its

own headquarters. Also, Duff performed her duties for NMTV out of TBN's offices during her TBN workday. She sometimes sent correspondence relating to NMTV on TBN stationery and used the same TBN interoffice memoranda for NMTV employees that she directed to TBN employees. 10 FCC Rcd at 12059 ¶317.

32. TBN employees, consultants, and lawyers were routinely used, often without any charge to NMTV, to perform services for NMTV. They participated in the preparation and prosecution of TBN's applications. TBN personnel performed all accounting activities for NMTV. TBN's chief engineer, Ben Miller supervised construction of the Odessa and Portland stations, authorized purchase orders for equipment and supplies, and oversaw operations without charge. TBN's communications counsel frequently performed work on behalf of NMTV. Originally they did not bill NMTV at all. Later, charges for NMTV work appeared as a line item in counsels' bills to TBN. 10 FCC Rcd at 12059-60 ¶¶ 318-19, 322.

33. Additionally, the ALJ reviewed the programming on NMTV's facilities. All of NMTV's LPTV and translators stations carry only TBN programming. The Odessa station also carried nothing but TBN programming. With the exception of its locally produced programming, the Portland station also carries nothing but TBN programming. 10 FCC Rcd at 12059 ¶¶ 320.

34. As a final matter, the ALJ pointed out that on numerous occasions, TBN represented to the public in its newsletter, "Praise the Lord," that NMTV was the "Satellite Division" of TBN. 10 FCC Rcd at 12059-60 ¶ 321. The ALJ concluded "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." *Id.* at 12060 ¶ 321.

### Exceptions and Discussion

35. TBF<sup>11</sup> and NMTV argue that the initial decision does not accurately depict the record in this case and that the record properly considered does not support a finding that TBN has exercised de facto control over NMTV. Because of the complexity of the record, we will review separately the exceptions and record concerning each of the six factors relied upon by the ALJ and then discuss our overall conclusion as to whether the record indicates de facto control.

36. Purpose. NMTV complains that, in finding that its sole purpose was to disseminate TBN programming, the ALJ ignored evidence that NMTV's establishment was

---

<sup>11</sup> As noted, TBF's exceptions were filed jointly with TBN. Given the identity of interests involved, references to TBF will be understood to include TBN.

intended to assist minorities, in conformance with Commission policy. NMTV asserts that Crouch, Duff, and the other directors all testified as to the intention of assisting minorities and that NMTV carried programming responsive to minority concerns and hired minorities. NMTV emphasizes that NMTV's "outside" minority directors, such as Espinoza, were community leaders, with substantial experience and a sincere desire to assist minorities. NMTV also contends that the absence of language in its governing documents regarding minority control has no significance, because such language was omitted for valid legal reasons and is unnecessary.

37. Without questioning NMTV's assertion that the corporation's creation was intended to assist minorities, we nevertheless find that many aspects of the record indicate that NMTV was viewed by its principals primarily as an instrumentality of TBN. For example, in applying for facilities, NMTV selected only communities that did not currently receive TBN programming over-the-air. Tr. 1744-46. As discussed below (paragraph 68, *infra*), NMTV stations were devoted almost exclusively to providing over-the-air TBN programming to these communities. This is not to say that every means that TBN used to extend the reach of its programming involved the exercise of control. For example, TBN had affiliation agreements with many stations it clearly did not control. NMTV, unlike other affiliated stations, however, was created by TBN for the purpose of carrying TBN programming. Hence, in this regard, NMTV was intended to serve as an instrumentality of TBN.

38. We do not, however, draw adverse inferences from the failure of NMTV's governing documents to mention minority purposes or control. Although it would be logical to include such provisions, the record contains no evidence as to whether bona fide minority-controlled entities coming before the Commission typically do. The testimony of Juggert, who drafted NMTV's articles of incorporation, gives a credible reason why minority purpose was not mentioned in this document. He stated that, at the time, the California Attorney General's office was actively prosecuting nonprofit corporations that exceeded the purposes stated in their articles and that the risk of prosecution was reduced by avoiding specificity. Tr. 3760-63. Juggert did not explain why other documents did not mention minorities (Tr. 3763), but the record does not support the conclusion that these were significant omissions.

39. Corporate composition. TBF and NMTV object to the ALJ's inference that Duff and the various "outside" directors are merely tools of Crouch and TBN. They contend that Duff's responsibilities as a director of NMTV do not simply represent an extension of her duties with TBN, but are distinct and more substantial. Indeed, they assert that Duff independently negotiated with TBN as to certain matters. They also take issue with the ALJ's finding that Espinoza and his successors were ignorant of and uninvolved in NMTV's affairs. They assert that the minority directors could remove Crouch without cause, whereas the bylaws of TBN and the "owned and operated" stations protected Crouch from removal. They place particular stress on claims that the minority directors overruled Crouch as to two

matters. First, they maintain that in 1987, Duff and Espinoza rejected a proposal by Crouch to sell the Odessa station. Second, they maintain that in early 1979 Duff and Espinoza, over Crouch's objection, sold the construction permit for the translator in Houston, Texas.

40. We find, as TBF and NMTV acknowledge, that this factor really boils down to whether Duff should be regarded as independent of or an agent of TBN, since she has been most responsible for supervising NMTV's activities. NMTV Exceptions at 9 ¶ 12. As the ALJ found, the participation of NMTV's other minority directors has been far less substantial.<sup>12</sup> See 10 FCC Rcd at 12036-39 ¶¶ 108-30.

41. We find that Duff should indeed be regarded as TBN's agent. Her duties at NMTV appear to be merely a part of her employment at TBN. Duff is a salaried employee of TBN but receives no salary from NMTV. Tr. 1335. Although she "squeezes in" her duties for NMTV while working at her TBN office, her salary is not diminished by the time she spends on NMTV's affairs. Tr. 1786-87. Moreover, Duff's functions with respect to the acquisition of NMTV's stations were virtually identical to the sorts of duties she performed at TBN. Thus, while Duff was involved in handling LPTV and translator affairs for NMTV, she was also head of TBN's low power department. MMB Exh. 107 at 2; tr. 1774. Her duties at TBN have included both low power and full power station acquisitions. MMB Exh. 309; TBF Exh. 121 at 18.

42. Although Duff exercised additional management functions with respect to NMTV's stations that she did not have with respect to TBN's (TBF Exh. 101 at 36-37), the record underscores that no real distinctions were made between the interests of TBN and NMTV in Duff's performance of her duties. This is illustrated by her role in the preparation of the December 4, 1989 program affiliation agreement for the Portland station (MMB Exh. 283), which Duff executed on behalf of NMTV and which Crouch (who was also president of NMTV) executed on behalf of TBN. Duff testified that she did not discuss the agreement with Crouch in detail and did not negotiate the amount of TBN programming that the station would carry. Tr. 1434. She further testified that she did not know whether Crouch reviewed the agreement and that he relied on her (since she was responsible for other TBN affiliation agreements) to protect TBN's interests. Tr. 1435-36. Similarly, Duff executed the January 2, 1992 production agreement under which the TBN program "Joy in the Morning" was produced at the Portland station (MMB Exh. 383). Duff, who executed the agreement for NMTV (Terrence Hickey, another NMTV/TBN official, signed for TBN), testified that she asked Juggert to prepare the agreement. She testified that Juggert prepared the agreement on

---

<sup>12</sup> We do not accord any particular significance to the fact that NMTV has had only three or four directors, while its bylaws authorize up to 10 directors. See TBF Exh. 101, Tab C at 3. We have no reason to doubt NMTV's claim that such provisions in bylaws are frequently boilerplate.

behalf of TBN and NMTV (Tr. 1438), for NMTV (Tr. 1439-40), and (in a deposition) for TBN (Tr. 1440).

43. In the same vein, the distinction between Duff's positions with TBN and NMTV were sometimes confused in correspondence. For example, Duff's January 30, 1987 letter transmitting the Odessa assignment application to counsel (MMB Exh. 126) is signed "Jane Duff, Assistant to the President" and written on TBN letterhead. Duff's January 18, 1988 response to a request concerning employment at the Portland station (MMB Exh. 177) was drafted in the same manner. Similarly, when TTI's name was amended to NMTV, Juggert sent the pertinent documents to TBN "Attn: Jane Duff." MMB Exh. 136.

44. We have also carefully examined another instance where Duff assertedly engaged in independent negotiations with TBN -- regarding TBN's provision of business services for NMTV. We find that this episode does not provide firm support for Duff's independence. TBN originally provided accounting, payroll, and other services to NMTV without charge and without any formal agreement. In 1991, TBN's accounting department complained to Duff that it wanted money, beyond that received under the affiliation agreement, to cover the cost of these services. Tr. 1424-25. TBN and NMTV thereupon entered into an agreement, executed by Duff on behalf of NMTV, under which NMTV paid TBN \$422.50 a month for these services. TBF 101, Tab W. Duff claims that this amount was arrived at through negotiations between her and TBN's accountant. TBF Exh. 101 at 40; Tr. 1426-28. Yet she testified that the accountant told her that TBN's cost for providing these services was twice that paid by NMTV or \$845. Duff further testified that an independent firm's charge for the these services would have been higher. According to Duff, she persuaded TBN to accept a fee of \$422.50, one-half of TBN's costs. The difficulty with treating this as an arm's length negotiations in which Duff protected NMTV's interests against those of TBN is that the result is not consistent with an arm's length transaction. NMTV did not even pay TBN's costs, let alone the market value of the services provided.

45. We have also carefully examined the two situations in which Duff and Espinoza purportedly overruled Crouch. Here again, however, we find that these episodes do not provide persuasive evidence of NMTV's independence. As previously mentioned, the first of these matters involves the Odessa station. Almost immediately after NMTV acquired the Odessa permit, on June 9, 1987, Crouch expressed dissatisfaction with the Odessa market, apparently because it was smaller than he realized and because he doubted that NMTV's station would be carried on local cable systems. Tr. 2723. The minutes of a special meeting of NMTV's board, on June 27, 1987, reflect that Crouch proposed to explore the feasibility of transferring the Odessa construction permit and acquiring a facility in another area. TBF Exh. 101, Tab B. The minutes further reflect that Duff and Espinoza opposed Crouch and that his motion failed for lack of a second. According to the minutes, Espinoza then recommended planning immediately to begin the development of local programming in Odessa, but that

Crouch felt that the station should rely on TBN programming until it was financially sound. The minutes state that Duff concurred with Espinoza and agreed to direct the development of the programming.

46. Although, on its face, this episode appears to support the view that, at least on some occasions, NMTV's board and its minority members prevailed in their position over the objections of Crouch, subsequent events do not bear out the decisions apparently made at the meeting. Despite the ostensible decision to develop local programming in Odessa, none was ever prepared. Duff's own testimony indicates that, contrary to the impression left by the minutes, her view coincided with Crouch's -- namely, that local programming was not financially justified. Tr. 1481-83. Espinoza testified that, although he felt that local programming was important, he had no alternative but to accept Duff's explanation that none would be developed. Tr. 4232-37.

47. Moreover, the station was ultimately sold, as Crouch wished. Approximately two months after the Odessa station began operation, at a special meeting on December 12, 1988, Crouch again raised the possibility of selling the Odessa station. TBF Exh. 101, Tab EE at 13. This time the matter was tabled. Five months later, in May 1989, the NMTV board unanimously authorized negotiations for the sale of the station. MMB Exh. 256. Duff explained that she had opposed the sale in June 1987 because she did not want to leave the impression that a minority enterprise had failed. Tr. 1733. By May 1989, she testified, she was satisfied that the station would not fail and that a proposed purchaser would provide local programming, and therefore had no objection to sale. Tr. 1881-83. Espinoza attributed the decision, made only seven months after the station commenced operation, to leave Odessa, to the desire of Crouch and TBN to reach larger markets. Tr. 4245-49. He testified: ". . . as a Hispanic, I of course would like to reach Hispanics, but the bottom line is the main goal is the preaching of the gospel to whomever." Tr. 4249. In sum, although these events demonstrate that Duff and Espinoza at times had influence on NMTV's decisions, the ultimate direction of policy appears to have stemmed from Crouch and TBN. It is also significant, as discussed in greater detail in paragraph 61, below, that the Odessa stations was sold for some \$100,000 less than NMTV's construction costs and that the board subsequently forgave Prime Time's \$650,000 debt. The fiduciary obligations of the board members toward NMTV are not evident in these actions.

48. The second matter concerned the Houston, Texas translator station. The Commission granted NMTV a construction permit for this station on January 29, 1988. MMB Exh. 180. NMTV made no effort to construct the station prior to expiration of the construction permit on July 29, 1989. Three months before expiration of the permit, on April 26, 1989, Duff wrote to May (TBF Exh. 101, Tab A), forwarding a sales agreement for the Houston permit and stating:

Paul [Crouch] and I did not agree on the selling of the permit, he would like to have built the station, selling it later but we have too much going on.

49. Duff explained in her testimony that, although TBN-affiliate CET already had a full power educational station in Houston, Crouch nevertheless wanted to build and operate the Houston translator to carry TBN programming. She attributed this to the fact that educational stations are permitted to engage in fundraising only for station purposes and could not carry TBN's fundraising telethon. Tr. 1819, 1821-22. Crouch also testified that he opposed selling the Houston translator for that reason. Tr. 2388-89, 2813. According to Duff, she had no time to devote to the construction of the Houston station because she was heavily involved in the construction of the full power station in Portland. Tr. 1818-21. She stated that because she disagreed with Crouch, she discussed the matter with Espinoza, who supported her. Tr. 1500-02. She further stated that Crouch was probably upset with her for her decision because "TBN really did suffer a loss of dollars." Tr. 1822.

50. The record suggests, however, that Crouch had little real interest in operating a low power station in a market which already had a full power TBN affiliate and that the final decision not to build had little significance to him. Crouch himself testified: ". . . the best I can recall is that there seemed to be a little inter-staff discussion and debate on whether or not that station really should be built or should not be built because of the duplication in coverage." Tr. 2813. (The matter does not appear to have been formally considered by NMTV's board.) Crouch's supposed interest in constructing and operating the station also seems at odds with the language of Duff's contemporaneous letter to May (above), which states that Crouch wanted to build the station and sell it, not to build it and operate it. See also Tr. 2815 (Crouch's testimony that sale of the station after construction was considered). The claim that Duff did not want to construct the Houston station because doing so would be too burdensome is belied by the fact that during the pendency of the Houston construction permit, NMTV's low power facility in Fresno, California was granted, constructed, and put into operation, apparently without undue burden. See MMB Exhs. 200, 230.

51. In any event, the record does not justify interpreting the decision not to build the Houston translator as an example of Duff acting independently of TBN by putting NMTV's interests above TBN's. Examining the likely impact of the decision on TBN and NMTV does not support such an interpretation. If, as Duff testified, the decision not to build cost TBN "hundreds of thousands of dollars" (Tr. 1822), it would also have been a significant loss to NMTV. According to Crouch, NMTV would have received "its fair share" of revenues from the market. Tr. 2389. NMTV, like the licensees of other non-owned and operated stations, typically received 80 percent of fundraising revenues derived from the zip code in which its stations were located. See TBF Exh. 101 at 41.

52. As a final matter relating to NMTV's board, we give little weight to the fact that NMTV's bylaws lack a provision contained in TBN's bylaws that would protect Crouch from removal by the other directors. TBN's bylaws were amended in 1979 to provide that, whereas other directors could be removed by majority vote of the directors without cause, directors holding the office of president (*i.e.*, Crouch) could only be removed for cause after a hearing.<sup>13</sup> TBF Exh. 104 at 11-12, Tab. C at 8-9. The bylaws of most, but not all, of TBN's "owned and operated" stations have the provision treating Crouch differently from other directors. MMB/TBF Exh. 1. NMTV's bylaws do not. TBF Exh. 104, Tab. D. By itself, however, the omission of the provision does not outweigh the substantial evidence, discussed above, that Crouch and TBN controlled NMTV.

53. Finances. TBF and NMTV argue that the financial arrangements between TBN and NMTV simply indicate that TBN is providing legitimate financial assistance to a minority company, as contemplated by Commission policy. TBF contends that the ALJ mischaracterized several aspects of the financial arrangements. It asserts that the financial services provided by TBN were negotiated by Duff, that NMTV could terminate these services at will, and that NMTV was intended ultimately to perform these services itself. TBF asks the Commission not to attribute any significance to TBN's early practice of including NMTV in consolidated financial reports. TBF emphasizes that, for purposes of allocating revenue, NMTV's stations are treated like stations that are not owned and operated by TBN. While acknowledging that TBN has made interest-free loans to NMTV on an informal basis, Trinity urges that these loans are strictly accounted for and will be repaid. Trinity and NMTV fault the ALJ for drawing an unwarranted inference because NMTV's forgiveness of Prime Time's indebtedness with respect to the Odessa station was not a business decision. They argue that the ALJ did not take into account that NMTV is a charitable not a business organization.

54. Although the record on this issue is mixed, on balance it provides additional evidence of TBN's control of NMTV. We agree with TBF and NMTV that NMTV's financial dependence on TBN does not per se imply that TBN controls NMTV. We have noted that nonprofit entities are frequently dependent in this way. See La Star Cellular Telephone Company, 7 FCC Rcd 3762, 3767 n.14 (1992), vacated on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC, 19 F.3d 655 (D.C. Cir. 1994). However, the record also indicates that NMTV's finances were not treated as being independent of TBN's from 1980 to 1987. While there have been significant corrective measures in this regard, we find that these have not been complete and the most significant measure was not taken until after a petition to deny was filed questioning NMTV's control.

---

<sup>13</sup> TBN's bylaws provide that directors serve for a term of three years. TBF Exh. 104, Tab C at 11. It is unclear whether Crouch has any protection from not being reelected after expiration of his term.

55. During NMTV's early years, from 1980 to 1987, before it acquired the Odessa station, there was an egregious failure to segregate NMTV's finances. As noted in paragraph 28, supra, during those years NMTV did not have its own bank account; its payroll and other financial operations were handled by TBN personnel and reflected as part of consolidated financial reports; and expenses and revenues were allocated to NMTV without regard to NMTV's actual operations.

56. In 1987, when NMTV acquired the Odessa station, corrective measures were undertaken on the advice of counsel (Tr. 3401-02). That year, NMTV opened its own bank account. TBF Exh. 101, Tab B. Also beginning in 1987, NMTV no longer appeared in TBN's consolidated financial reports and, even more significantly, the financial reports no longer attributed non-NMTV low power revenues and expenditures to NMTV. TBF/Glendale Jt. Exh. 1 at 6, 12, 18-19. Additionally, in 1987, NMTV took the first step to formalize its arrangements with TBN under which TBN provided accounting, payroll, and other business services, by formally authorizing TBN to provide these services. TBF Exh. 101, Tab EE at 1. Moreover, the program affiliation agreements for the Odessa and Portland stations do not treat these NMTV stations as owned-and-operated. The agreements use a formula in which 80 percent of the donations derived from the zip code in which the station is located is allocated to NMTV and 20 percent to TBN. TBF Exh. 101 at 41, Tab X at 5, 16. This is the formula used for non-owned affiliates. By contrast TBN receives 100 percent of the zip code revenue for owned-and-operated stations. Id.

57. These measures, while significant, have been incomplete. While NMTV has its own bank accounts, a variety of TBN officials have been signatories on these accounts. See MMB Exh. 396; paragraph 63, infra. Espinoza, NMTV's chief financial officer, moreover, did not sign any checks. Tr. 4177-78. Similarly, although NMTV moved to formalize TBN's provision of business services to NMTV (including entering into the previously discussed accounting and payroll contract in 1991), this arrangement has not been an arm's length transaction, since TBN provides services at below cost. Although the contract provides that NMTV can terminate these services and Crouch testified that NMTV will ultimately perform these services itself (Tr. 2999-3000), the record contains no indication of how or when this will be done.

58. We find that the most significant factor, however, is the manner in which TBN has provided capital and credit to NMTV. During the years 1987-92, TBN advanced some \$9.8 million to NMTV for the acquisition and construction of stations and the payment of various expenses. TBF/Glendale Jt. Exh. 1 at 15-27. For most of this time, as was the case with respect to TBN's owned-and-operated stations, TBN's practice was to make these advances without any formal note, interest, security, or repayment schedule. TBF Exh. 104 at 16; Tr. 1701, 2150-51, 2546-47, 2874-76, 3809-10, 3951-53. Not until August 1991, after a petition to deny had been filed against the Wilmington application, did NMTV execute a

formal note to cover funds loaned by TBN, in this case for the purchase of the Wilmington station. MMB Exh. 368. Not until 1992-93, did NMTV take formal measures to repay other indebtedness to TBN, although without the payment of interest. MMB Exhs. 386, 399; Trinity Exh. 101, Tab. II.

59. These financial arrangements and practices indicate clearly that NMTV was not viewed as an independent entity. In their testimony, Crouch and Juggert acknowledged that in making informal, interest-free loans, TBN treated NMTV like an owned-and-operated company and that the practice was based on TBN's inside knowledge and involvement in NMTV's operations. Tr. 2997-98, 3819-21, 3956. Moreover, the informal advance of substantial sums of money can easily translate into determination of policy and did so here. A number of situations illustrate this. For example, no funds were forthcoming to construct a studio in Odessa in the face of Crouch's and TBN's misgivings about the Odessa market.

60. In addition, some actions taken by NMTV, while consistent with NMTV's charitable and religious purposes, would be difficult to justify or explain, in view of NMTV's limited resources, except as manifestations of TBN's interest in supporting certain activities. For example, in October 1992, NMTV proposed to loan \$1.5 million to assist in the formation of Community Brace, Inc. (Community Brace), a Minority Enterprise Small Business Investment Corporation (MESBIC). TBF Exh. 10 at 21-24; TBF Exh. 101, Tab EE at 37-39. Community Brace was affiliated with NMTV's director, Hill, whose activities TBN also supported apart from his involvement with NMTV. TBF Exh. 102 at 10-12. TBN was to provide \$1 million to underwrite NMTV's \$1.5 million loan. The transaction, which was later abandoned for various legal reasons, was handled principally by TBN's counsel, Juggert. See Glendale Exh. 218. NMTV's lack of capital suggests that it would have been more logical for TBN to have supported Community Brace directly and only Hill's status as a director of NMTV made it expedient to use NMTV for that purpose. Consistent with this interpretation, director Aguilar, who was an outsider to the TBN-Hill relationship, relied totally on Crouch in approving the Community Brace transaction and was completely ignorant of the project's ultimate fate. TBF Exh. 107 at 177-79. Moreover, May suggested the utility of the Community Brace project in this regard when he said in a letter to Juggert that approval of the project by the Small Business Administration could be used to "estop" the FCC from finding that NMTV was not minority-controlled. Glendale Exh. 218 at 35.

61. Similar considerations underlie NMTV's March 1993 decision to forgive Prime Time's \$650,000 debt incurred in the purchase of the Odessa station. TBF Exh. 101, Tab EE at 40-41. Given the fact that NMTV borrowed over \$750,000 from TBN in connection with the Odessa station (paragraph 47, *supra*) and was more than \$5 million in debt to TBN overall (TBF/Glendale Jt. Exh. 1 at 26), it is difficult to conceive of this action as financially sound without being underwritten by TBN, which would benefit by the continuation of its programming on the station. We reject the idea that charitable organizations are somehow

immune to financial concerns simply because they are not profit-making businesses. Ramirez' testimony is consistent with the conclusion that NMTV did not exercise independent financial judgment in this matter. He stated that when he voted to forgive the Prime Time debt (he had just been appointed as a director) he heard no discussion of the pros and cons of forgiving the debt, whether NMTV could afford to forgive the debt, or whether there were any alternatives. Tr. 4066, 4071-72, 4120-21. (The record is unclear whether TBN forgave NMTV's indebtedness for the Odessa station. Testimony by NMTV's accounting firm indicates that no indebtedness was ever forgiven. TBF/Glendale Jt. Exh. 1 at 27. NMTV's 1992 tax return, however, shows entries for NMTV's forgiveness of Prime Time and TBN's forgiveness of NMTV. MMB Exh. 413 at 11, 13.) This episode provides further evidence of NMTV's lack of financial independence.

62. Personnel. As they did with respect to finances, TBF and NMTV argue that the participation of TBN personnel in NMTV's affairs represents TBN's legitimate assistance to a minority company, as contemplated by Commission policy. TBF stresses that Duff and the NMTV board, not TBN, had the authority to hire and fire NMTV personnel. TBF also asserts that the functions performed by TBN personnel for NMTV were not the same as their jobs for TBN.

63. We find that the high degree of involvement of TBN personnel in NMTV's affairs further supports a finding that the two entities did not operate independently. We have already discussed the difficulty in separating Duff's responsibilities towards TBN and NMTV. This factor also undercuts the argument that Duff's authority to hire and fire demonstrates NMTV's independence. Other key officials also "wore two hats" in that same way. Crouch himself was the president of both TBN and NMTV. See, e.g., TBF Exh. 101, Tab R at 63, 72. The testimony of Hill and Espinoza indicates that Juggert was regarded as NMTV's legal counsel as well as TBN's and participated at NMTV board meetings. Tr. 1926, 1932-33, 4319-20. Juggert acknowledged, for example, that in preparing the program affiliation agreement for the Portland station, he represented the interests of both NMTV and TBN without discussing any conflict of interest with Duff. Tr. 3664-66. TBN's FCC counsel was also regarded as NMTV's. Tr. 1933. Additionally, several TBN officials have served as officers of NMTV, including: Philip Crouch (Paul's brother; chief of staff, TBN; assistant secretary, NMTV), Matthew Crouch (Paul's son; administrative assistant, TBN; assistant secretary, NMTV), Allan Brown (chief of staff and director of finance, TBN; assistant secretary, NMTV), Terrence Hickey (vice president, TBN; assistant secretary NMTV), and Charlene Williams (director of finance TBN; assistant secretary NMTV). MMB Exhs. 107, 309, 396; TBF Exh. 101, Tabs Q at 38, R at 138, EE at 11, 16, 34. Philip Crouch, Matthew Crouch, Brown, Hickey, and Williams have also been signatories on NMTV's bank account. MMB Exh. 396.

64. Further overlap in duties occurred because TBN made its engineering and

administrative resources available to NMTV without charge. See TBF Exh. 104 at 16. In this regard, Ben Miller, TBN's vice president and director of engineering, also served as a "technical consultant" for NMTV. MMB Exh. 378. Although, as TBF and NMTV claim, he had comparatively few and limited routine duties concerning NMTV (see Glendale Exh. 210 at 96-97, 138-39), the record indicates that he sometimes exercised his authority in a manner that blurred the distinction between his dual roles. On at least one occasion, Miller signed correspondence to counsel as director of engineering of NMTV. MMB Exh. 249. Miller sent correspondence, memos, and purchase orders concerning NMTV's stations over his signature as a TBN official. MMB Exh. 228, 242, 361, 362. Outside parties have also addressed correspondence concerning the Odessa station to Miller in his capacity as a TBN official. MMB Exh. 198. In one instance, Miller sent a memo to the staff of the Odessa station on NMTV engineering department stationery, in which he said "We have two surplus [pieces of equipment] here at TBN's facility in California which I will have sent to you . . . ." MMB Exh. 328. Similarly, several individuals, who worked on TBN's low power applications, did similar work for NMTV in most cases without charge. Tr. 1412-16, 2142-43, 2170-71. When Crouch was interested in investigating the Wilmington station for NMTV's purchase, he sent a TBN station manager, Dale Osborn, who prepared a report (which Miller reviewed) without charge to NMTV. MMB Exhs. 331, 333, 334; Tr. 2921.

65. Additional overlap occurred with respect to administration. TBN provided bookkeeping and accounting services including payrolls, financial statements, income tax returns, purchasing requirements, and accounts payable. See TBF Exh. 101, Tab W. NMTV and TBN used the same accounting firm. TBF/ Glendale Jt. Exh. 1 at 1, 5-6. NMTV also used technical manuals developed for TBN stations. Tr. 2128. NMTV's employee policies and insurance plans were modelled after TBN's. See TBF Exh. 101, Tab CC (NMTV and TBN health insurance records); MMB Exh. 182 (NMTV use of TBN employment form; MMB Exh. 245 (Duff memo regarding rules and regulations).

66. Additionally, past association with TBN was a factor in several key hiring decisions. All of NMTV's "outside" minority directors had previously been involved in TBN programs. TBF Exh. 102 at 9 (Hill); TBF Exhibit 103 at 5 (Ramirez); TBF Exh. 106 at 2-3 (Espinoza); TBF Exh. 107, Tab A at 4 (Aguilar). Jim McClellan was working on the TBN program "Joy in the Morning" when he was hired to be the station manager in Portland. McClellan heard about the opening from TBN's Miller and Hickey. TBF Exh. 109 at 6. He then approached Duff, who hired him. Id. at 8; TBF Exh. 101 at 47-48. The production of "Joy in the Morning" followed McClellan to Portland. Trinity Exh. 109 at 14-15. Similarly, Duff hired TBN employee Mark Fountain as chief engineer at Portland based on Miller's recommendation. Tr. 1908-10, 2260.

67. Programming. TBF and NMTV argue that the fact that NMTV stations are TBN programming affiliates does not establish that TBN controls NMTV. They insist that

NMTV's directors elected to carry TBN programming because they independently believe that it serves the needs of minorities. TBF contends that it would violate the First Amendment for the Commission to draw adverse conclusions from NMTV's choice of programming.

68. The record in this proceeding provides no support for a finding that NMTV exercises programming discretion independent of TBN. NMTV's stations have always functioned as TBN outlets. Both the Portland and Odessa stations carried the entire TBN schedule. Tr. 1433, 4424. It was understood that NMTV's low power stations would carry TBN programming. Tr. 2970, 4327. All NMTV stations are listed as TBN affiliates. MMB Exh. 341 at 6. As noted above (paragraph 37), NMTV typically applies for facilities in communities that do not already receive over-the-air TBN service. Even to the extent that NMTV has provided local programming (in Portland) this programming is strongly connected with TBN. "Joy in the Morning," produced in Portland, is carried as a TBN network show and was originally produced in TBN's California studios. TBF Exh. 101, Tab EE at 36; TBF Exh. 109 at 14-15. The local program "Northwest Praise the Lord" is produced in accordance with TBN guidelines and, unlike non-owned stations, NMTV is not required to get TBN clearance for its content. Tr. 4423-24. The nonbroadcast charitable project, "His Hand Extended," is modelled after TBN's version. Tr. 4419-20. The Portland station sends monthly reports concerning its local Prayer Partners Line to the director of TBN's prayer ministry. Tr. 4417, 4419. At times of the day when Portland's Prayer Partners telephone line is not active, the station gives out TBN's number. Tr. 4418, 4464-65.

69. We recognize that the fact of program affiliation is not in itself indicative of control. See Fox Television Stations, Inc., 10 FCC Rcd 8452, 8519 ¶ 165 (1995) (subsequent history omitted). Nor do we question the sincerity of the testimony by NMTV's principals as to the merit of TBN's programming. See TBF Exh. 101 at 44-45 (Duff); TBF Exh. 102 at 11 (Hill); TBF Exh. 103 at 11 (Ramirez); TBF Exh. 106 at 16-17 (Espinoza). However, given the relationship between these witnesses and TBN, this view seems a foregone conclusion and provides no evidence of independent programming discretion. We do not believe that our conclusions in this regard in any way infringe freedom of speech or religion. We draw no adverse conclusions from the fact that NMTV stations carry any specific programming. We draw our conclusions only from the apparent absence of independent programming discretion.

70. Representations to the Public. TBF maintains that no adverse conclusion should be drawn from representations that NMTV was TBN's "satellite division." According to TBF, the term "division" was not being used in any legal or technical sense, and it claims that the term was not applicable despite the evidence that the finances of NMTV were not being handled separately, NMTV and TBN had consolidated annual meetings, and Duff and others intermingled their duties with TBN and NMTV.

71. We find that such circumstances provide further evidence of TBN's failure to

respect the independence of NMTV. Several issues of the TBN "Praise the Lord" newsletter for the years 1982-84 describe Espinoza as a "board member of our Satellite Division." MMB Exhs. 49 at 17, 53 at 11, 66 at 5, 76 at 5, 82 at 12. Crouch acknowledges that he reviewed this language and that it is inappropriate. Tr. 2556. Espinoza also acknowledges that he was aware of this language. Tr. 4172. Crouch claims that he was not distinguishing between a "division" and an "affiliate." Tr. 2556. However, during that same time period, NMTV was, in fact, being treated as a division in several respects. NMTV annual meetings were conducted as part of TBN's combined annual meetings. See, e.g., MMB Exh. 91. NMTV was included in combined financial statements. Trinity/Glendale Jt. Exh. 1 at 3-4. NMTV did not have its own employees or bank account. Id. at 3. Thus, the description of NMTV as a "division" appears to reflect NMTV's true status in the minds of TBN's principals. However, as previously discussed, after 1987, when NMTV acquired the Odessa station, NMTV was no longer treated in this manner. Likewise, the record discloses no references to NMTV as a "division" after that time.

72. Summary. We find that the totality of the evidence demonstrates TBN's de facto control of NMTV. The determinative question is whether TBN has the power to "dominate the management of corporate affairs." See Fox Television Stations, Inc., 10 FCC Rcd 8452, 8514 ¶ 154 (1995) (subsequent history omitted), quoting Benjamin L. Dubb, 16 FCC 274, 289 (1951). In this regard, as our preceding discussion indicates in greater detail, we have examined evidence of TBN's control with respect to the policies that we typically consider most indicative of control, namely those regarding: (1) the finances of the station, (2) personnel matters, and (3) programming. See Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981). As to station finances, we find that TBN's practice of informally funding NMTV based on TBN's inside knowledge and involvement indicates that the two entities were not viewed as independent and allowed TBN to determine NMTV's policies. Thus, our examination of the decisions regarding the Odessa station, especially the decision to forgive Prime Time's indebtedness, the decision to sell the Houston translator, and the Community Brace project persuades us that TBN's financial involvement has indeed had a tangible impact on NMTV's policies. As to personnel matters, we find that the dual roles played by key TBN/NMTV officials, the extensive use of TBN administrative and engineering personnel and resources in NMTV's business, and the practice of making key appointments from the ranks of TBN personnel effectively removes any distinction between the two organizations and goes beyond TBN's merely providing assistance to NMTV. Finally, as to programming, we find no evidence that NMTV realistically exercises discretion independent of TBN.

73. This case, therefore, differs from Southwest Texas, supra, where we found that the University of Texas did not exercise de facto control over the licensee's stations, although it managed and largely financed them. We found that despite the University's substantial involvement, the licensee continued to exercise control over the station's basic policies. 85

FCC 2d at 714. (Moreover, we noted that the management agreement and related financial arrangements with the University had been terminated.) Here, although the parties have taken some steps to operate NMTV as a separate entity, for example, by conducting business through formal actions of NMTV's board, we find the record devoid of evidence corroborating true independence in policy decisions. For the reasons stated above, we are not persuaded that the episodes involving the construction of the Odessa station and the sale of the Houston translator substantiate independence. We do not find credible the suggestion that NMTV could theoretically oust Crouch or terminate TBN programming. Without in any way impugning the parties' sincerity in wishing to serve minorities, we find that a preponderance of the evidence indicates that NMTV is still treated essentially as an instrumentality of TBN.

74. We also distinguish this case from Fox, supra, in which we held that the licensee, Fox, was not controlled an alien-owned corporation, News Corp., in violation of the foreign ownership restrictions of the Communications Act. We made this finding despite the facts that (1) News Corp. had a substantial equity interest in Fox, (2) Fox and News Corp. had some common directors and used the same attorneys, (3) Fox was controlled by Rupert Murdoch (a United States citizen), who was News Corp.'s chairman and CEO, and (4) a News Corp. subsidiary provided programming to Fox. 10 FCC Rcd at 8514-19 ¶¶ 154-65, 8522 ¶¶ 174-75. Despite these factors, we found, on the totality of the evidence, that News Corp. functioned as a passive investor in Fox, and that de facto, as well as de jure, control over Fox was effectively exercised by Murdoch, a United States citizen, as an individual rather than by News Corp. Murdoch's, rather than News Corp.'s, control was established by many factors indicating his dominance over the licensee's operations. By contrast, the record here establishes that TBN was no passive investor in NMTV, but through Crouch and other TBN personnel, including its accountants, attorneys, and engineers, was an active participant in many facets of NMTV's operations to such an extent that NMTV did not function as an independent entity. Moreover, in this case, in which the issue is whether NMTV was minority-controlled, there is no counterpart to Murdoch's role with respect to the alien ownership issue in Fox. That is, there is no minority individual who controls both NMTV and TBN. Duff, while a minority, is Crouch's subordinate at TBN. Crouch, who exercises the greatest degree of common control between the two entities, is a nonminority.

## B. Abuse of Process

### Initial Decision

75. The ALJ found that Crouch and TBN abused the Commission's processes by using NMTV as a "surrogate" in applying for authorizations. 10 FCC Rcd at 12060 ¶ 324. He found that they exhibited specific abusive intent by (1) seeking to circumvent the Commission's rules and improperly claiming minority preferences and (2) in deliberately concealing the nature and extent of the relationship between TBN and NMTV. Thus,

according to the ALJ, TBN -- knowing that NMTV was not minority controlled -- falsely claimed minority preferences in applying for translator and LPTV licenses and falsely claimed an exception to the multiple ownership rules in acquiring the Odessa and Portland stations and attempting to acquire the Wilmington station. *Id.* at 12060-61 ¶¶ 325-29. The ALJ further found that TBN repeatedly concealed from the Commission material facts regarding the relationship between NMTV and TBN. *Id.* at 12061-62 ¶¶ 330-31.

76. The ALJ rejected the contention that Crouch had relied on the advice of counsel in claiming NMTV's entitlement to minority preferences. The ALJ found that Crouch intended to claim such preferences irrespective of counsel's advice and knew that NMTV's entitlement to preferences was suspect. He also rejected Crouch's assertion that he had directed counsel to make full disclosure of material facts. 10 FCC Rcd at 12062 ¶¶ 332. See also paragraphs 6, 20, supra. Finally, the ALJ noted that Crouch had been found to have abdicated responsibility to assure himself that representations in a renewal application were true and correct, International Panorama TV, Inc. (KTBN-TV), 83D-4 (ALJ Jan. 25, 1983) (SALAD Exh. 35), but that this previous misconduct had no deterrent impact on Crouch and TBN. Accordingly, the ALJ concluded that TBF's application for renewal of its license for WHFT(TV) should be denied.

### Exceptions and Replies

77. TBF and NMTV deny that there has been any abuse of the Commission's processes. They claim that Commission precedent with respect to the type of control required in order to claim minority preferences is at best unclear. They contend that Commission precedent both condones passive minority ownership and encourages nonminorities to provide administrative, technical, and financial assistance to minorities -- such as TBN provided to NMTV. In this regard, they assert that each time NMTV claimed minority preferences, Crouch and Duff consulted with communications counsel, who assured them that, as long as minorities constituted a majority of NMTV's board of directors, NMTV was in compliance with Commission policies for seeking minority preferences. According to TBF and NMTV, Crouch and Duff had no reason to disbelieve such advice.

78. TBF also denies that any material information was withheld from the Commission. It asserts that NMTV's applications revealed the commonality of directors between TBN and NMTV, as well as the facts that NMTV would carry TBN programming and that TBN would finance NMTV. It further asserts that additional facts about TBN's relationship with NMTV were revealed in other Commission filings.<sup>14</sup> TBF observes that in

---

<sup>14</sup> Like the ALJ, we do not believe that information contained in various filings, such as ownership reports etc., supports TBF's position on the abuse of process issue. We agree with the following observation by the ALJ:

connection with the Odessa assignment application communications counsel met with staff members of the Mass Media Bureau's Video Services Division and submitted further information at their request. TBF disputes the ALJ's finding that Crouch did not direct counsel to make full disclosure; it contends that Crouch told counsel to disclose all material information. Trinity asserts that in International Panorama, supra, Crouch and his communications counsel, May, were found to have been candid.

79. In its proposed findings of fact and conclusions of law, the Bureau initially argued that, although TBN did exercise de facto control over NMTV, TBF should not be disqualified. MMB PF&C at 158-59, 184-85. The Bureau agreed with TBF that no abuse of process had occurred with respect to NMTV's LPTV and translator applications because Commission policy only required that minorities constitute a majority of NMTV's board of directors and did not require that they exercise de facto control. Id. at 151, 155-56. The Bureau further proposed that NMTV's acquisition of full power stations violated Commission policy since the rules required that minorities exercise de facto control of NMTV for this purpose. Id. at 150-55. However, the Bureau maintained that the record did not support a finding that Crouch, TBN, or NMTV intended to deceive the Commission in this respect. Id. at 159. Therefore the Bureau opposed disqualification.

---

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 TBN applications or had witnessed signing of a purchase agreement for a television translator construction permit or station. 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' [emphasis added] is the person primarily responsible for the station's EEO program. Only with respect to the ownership report for CET [the corporation set up to acquire and hold noncommercial TV licenses] 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...It required *two* Commission letters of inquiry before sufficient facts were forthcoming to permit even a preliminary analysis of the TBN/NMTV relationship. 10 FCC Rcd at 12061 n. 47.

80. The Bureau, however, now supports TBF's disqualification. It reaffirms its position that there was no abuse of process with respect to the LPTV and translator applications because, with respect to those stations, Commission policy as to de facto control had not been clarified before the hearing designation order in this case. MMB Reply at 2-3. As to the full power stations, the Bureau indicates that after further reviewing the record, in light of the initial decision, it now believes that the record does support a finding of intentional deception. *Id.* at 3-4, 14.

81. Glendale and SALAD fully support the initial decision. They argue that Commission policy clearly requires that minorities have de facto control both in the context of the low power and full power applications in this case. Glendale argues that NMTV's applications concealed material information concerning the full extent of TBN's participation in NMTV's affairs. Glendale especially criticizes statements in NMTV's opposition to the petition to deny in the Wilmington proceeding, in which NMTV made statements that Glendale asserts are misleading. Glendale contends that Crouch and Duff did not rely on valid advice of counsel.

### Discussion

82. The ALJ concluded that "TBN and Crouch created a 'sham' corporation to take advantage of the minority preference" and repeatedly concealed material facts from the Commission that would have made clear that TBN controlled NMTV. 10 FCC Rcd at 12061-62 ¶¶ 330-31. More specifically, the ALJ found, "none of NMTV's applications seeking a minority exemption . . . disclosed to the Commission information about Duff's relationship with TBN or NMTV's relationship with TBN." *Id.* at 12030 ¶ 65. The ALJ concluded that NMTV's applications were "models of nondisclosure" in that regard, and therefore constituted abuse of process. *Id.* at 12062 ¶ 332. He held that: "The repeated concealment of material facts concerning the TTI/NMTV relationship with TBN cannot be [sloughed] off as an unintentional mistake. It was intentional deception since disclosure would have thwarted TBN's and Crouch's ambitions. . . . The Commission's 'scheme of regulation rests on the assumption that applicants will supply the Commission with accurate information.'" *Id.* at 12062 ¶ 331.

83. We agree with the essence of the ALJ's finding. As our discussion under the de facto control issue indicates, NMTV was created in order to give Crouch interests in stations that would otherwise be prohibited and to give TBN outlets for its programming that would otherwise be unavailable. This objective could be realized only by representing that NMTV was "minority-controlled" Our findings show that NMTV was in fact controlled not by its predominately minority board of directors but by TBN and that it was distinct from TBN in form only. Abuse of process includes the use of a Commission process to achieve a result that the process was not intended to achieve. See Broadcast Renewal Applicants, 3 FCC Rcd

5179, 5199 n.2 (1988). That is certainly the case here. However, abuse of process further implies not only that the purposes of a Commission policy have been subverted but that the parties had specific abusive intent. See Evansville Skywave, Inc., 7 FCC Rcd 1699, 1702 n.10 (1992). Thus, the issue becomes whether TBN's principals acted with a good faith belief that NMTV could honestly be presented as "minority-controlled" or whether they acted with knowledge that the claim was false or with reckless disregard of the truth.<sup>15</sup> See Evansville Skywave, Inc., 7 FCC Rcd 1699, 1700 ¶ 14 (1992). We conclude, that with respect to NMTV's full-power applications, the principals knew that, because of the relationship between NMTV and TBN, their claim of minority control was at best doubtful and at worst false.

84. The failure of the relevant full power applications to disclose Duff's relationship with TBN is especially telling with respect to TBN's abusive intent. Crouch is the President of TBN and Duff is Assistant to the President of TBN, while NMTV's board consisted of three members for most of the period in question. Had the applications stated that Duff was Crouch's Assistant -- and hence that the President of TBN and his Assistant constituted the majority of NMTV's board -- it clearly would have called into question the claim that NMTV was minority-controlled for the purposes of the multiple ownership rules. Similarly, the applications did not apprise the Commission of TBN's massive involvement in NMTV's finances, employment practices, and programming. A reasonable person could appreciate that if all of the circumstances had been made clear, the Commission would have had ample reason to inquire further and ultimately to deny NMTV's applications. Moreover, the record confirms that TBN's principals knew that the circumstances surrounding TBN's relationship with NMTV made it inappropriate to claim minority control without fully disclosing to the Commission the nature of that relationship. We will expand on these findings below, but first, we deal with NMTV's low power applications.

85. Because we find a serious abuse of process with respect to NMTV's full power applications, we need not dwell at length on the low power applications. The Bureau agrees with TBF that, at the relevant time, Commission precedent did not make reasonably clear that the Commission expected minorities to have de facto control of low power applicants, such as NMTV, under our policies. Our own review of the record confirms that applicants may well have been confused, before the HDO in this proceeding clarified the point (8 FCC Rcd at 2480 ¶ 38), that the exercise of de facto control by nonminorities subverted the purposes of the minority ownership policy in this context. The focus of the Commission's earlier precedent regarding lotteries was on the composition of the board and beneficial ownership, and not on de jure or de facto control. We therefore credit May's testimony that he read the

---

<sup>15</sup> Reckless disregard is the equivalent of knowing deception. See RKO General, Inc., 670 F.2d 215, 225 (D.C. Cir. 1981), citing, Golden Broadcasting Systems, Inc., 68 FCC 2d 1099, 1106 ¶ 16 (1978).

1983 report and order and public notice and, pursuant to their language, advised Crouch and Duff that NMTV could certify its status as minority owned based on the composition of its board of directors. TBF Exh. 105 at 9-12; Tr. 3273-77. Because May's advice was reasonable in light of the existing precedent and consistent with the Bureau's own interpretation, we find that Crouch and Duff were entitled to rely on this advice. We will not discuss this matter further.

86. In contrast to the policies regarding low power applications, however, we find that Commission rules and precedent have always given fair notice that de facto control is required to take advantage of the special provision concerning minority ownership in the multiple ownership rules. NMTV's applications were filed pursuant to a provision of the Commission's multiple ownership rules which provided that a licensee or its stockholders, partners, members, officers, and directors may not own, operate, control, or have a cognizable interest in more than 14 television stations or more than 12 stations that are not "minority-controlled." 47 C.F.R. § 73.3555(e)(1) (1986). Because Crouch, an officer and director of both TBN and NMTV, already had an interest in 12 stations, his ability to acquire an interest in additional stations licensed to NMTV depended on whether NMTV was "minority-controlled." The rules state that "*Minority-controlled* means more than 50 percent owned by one or more members of a minority group." 47 C.F.R. § 73.3555(d)(3)(iii) (1986). However, the multiple ownership rules also specifically provide that: "the word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised." 47 C.F.R. § 73.3555(d) Note 1. The clear intent of Note 1 is to prevent licensees from circumventing the limitations imposed by the multiple ownership rules by exercising actual control over stations over which they did not have legal control. Moreover, Note 1 reflects the Commission's long-standing precedent, applicable to non-stock corporations such as NMTV, that "control" encompasses every form of actual or legal control over basic operating policies. See Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

87. Contrary to TBF's suggestion, Commission precedent has always required minorities to exercise de facto control over "minority-controlled" stations. Indeed, it is hard to imagine how an entity controlled by minorities in name only or in which the minorities' interests are totally passive could foster the objective of the Commission's policies to "broaden minority voices and spheres of influence over the airwaves. . . ." <sup>16</sup> The memorandum opinion and order adopting the provision at issue makes specific reference to the traditional standard. It states that:

A question arises as to the proper definition of a minority owned station for the purposes of our multiple ownership rules. In this regard, we

---

<sup>16</sup> Minority Ownership in Broadcasting, 92 FCC 2d 849, 850 ¶ 2 (1982).

---

note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies. [Footnote citing Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982) (Policy Statement)]. 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 . . . .

Amendment of Section 73.3555, 100 FCC 2d 74, 95 ¶ 46 (1985) (Memorandum Opinion and Order).<sup>17</sup> While this language does not directly set forth the Commission's policy with respect to minority ownership, the Policy Statement, cited by the Memorandum Opinion and Order does.

88. The Policy Statement notes that the basic standard for minority ownership was originally enunciated in the Commission's 1978 policy statement, Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 983 n.20 (1978) (1978 Policy):

We currently anticipate issuing a [tax] certificate where minority ownership is in excess of 50% or controlling. Whether certificates would be granted in other cases will depend on whether minority involvement is significant enough to justify the certificate in light of the purpose of the policy announced herein.

Policy Statement, 92 FCC 2d at 853 ¶ 7. The Policy Statement discusses the Commission's

---

<sup>17</sup> TBF also relies on the dissenting statement of the Commissioner (later Chairman) Dennis R. Patrick that:

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 owners may contribute to diversity. No concern is given as to whether the 51 % minority owners will exert any influence over the station's programming or will have any control at all.

Memorandum Opinion and Order, 100 FCC 2d at 104. This dissenting statement does not, of course, reflect the views of the Commission majority who adopted the rule, nor is it evidence that the Commission, in adopting the 51 percent standard, was not concerned that minorities would have any control over station policies, as Commissioner Patrick claimed. As discussed above, the Commission clearly intended to establish a "meaningful standard" of control to ensure that minorities had actual control over the stations benefiting from its minority ownership policies.

application of this standard to specific situations and makes clear that what the Commission had in mind was 50 percent ownership that constitutes voting control or an equivalent degree of interest. Lacking that, the Commission would decide on a case-by-case basis whether the minority interest was sufficient to accomplish the purposes of the policy.

89. This is clear in the Policy Statement's discussion of William M. Barnard, 44 RR 2d 525 (1978), which was decided within months after the Commission enunciated the 1978 Policy standard. Policy Statement, 92 FCC 2d at 853-54 ¶ 7. There, the Commission granted a tax certificate for assignment of a station to a limited partnership in which minorities held a 45.5 percent equity interest and a minority served as the general partner with full authority to manage and control the station. The Commission held that it would grant the tax certificate because minorities both held a substantial equity interest and had complete control over station affairs. Id. The Policy Statement adopted the Barnard treatment of limited partnerships, which required both substantial equity and actual control, and stated explicitly that it would review limited partnerships to avoid "sham" arrangements, by determining whether the minority general partner actually had the authority to determine the basic policies of the station's operations.<sup>18</sup> Policy Statement, 92 FCC 2d at 854 -55 ¶¶ 8-11. In this regard, the Commission cited Southwest Texas Broadcasting Council, supra, thereby manifesting an intent to require de facto control in this context, id. at 855 n.29, in order to achieve the underlying objectives of the policy.

90. In addition to dealing with the tax certificate treatment of limited partnerships, the Policy Statement also extended the tax certificate policy in certain respects. It provided that tax certificates could be issued for the sale of shares in a minority-owned or minority-controlled licensee by individuals, whether members of minority groups or not, who had provided financing for the initial acquisition of the license. The Policy Statement states:

Generally, to be eligible for a tax certificate, such transactions must not reduce minority ownership of and control in the entity below 51 percent. [Footnote omitted]

Policy Statement, 92 FCC 2d at 857 ¶ 16. [Emphasis added] Thus, as the Memorandum Opinion and Order notes, while the precise combination of equity and control may vary in different contexts, the Commission has consistently required that minorities have both a substantial equity interest and actual control of the station.

---

<sup>18</sup> By contrast, the Policy Statement did not adopt a proposal cited by TBF that nonminorities would be encouraged to enter into "joint ventures" with minorities in which they would provide financing, management, and technical assistance. See Policy Statement, 92 FCC 2d at 852 n.17.

91. We find that the record concerning the filing of the Odessa application on February 3, 1987 discloses that Crouch, Duff, and May were aware that the extent of TBN's involvement in NMTV's operations in connection with that application made it doubtful that they would be able to comply with those requirements. Like the ALJ, who heard the witnesses and who could assess the forthrightness of their testimony, we are not persuaded that the parties' failure to make full disclosure of all relevant facts and circumstances to the Commission can properly be excused on the basis of alleged reliance on counsel. Although May advised Duff and Crouch that NMTV qualified as a minority-controlled entity based on the composition of its board of directors (TBF Exh. 105 at 11, 15-16; Tr. 3487-90), he admitted that he also advised that, to satisfy the Commission's requirements, NMTV's board had to have actual control over the operations of NMTV and that Crouch and TBN could not supplant the board's authority over its affairs. Tr, 3226, 3228-29, 3604.

92. We reject May's testimony that he felt assured that NMTV was in compliance with the de facto control standard. May testified that he believed that TBN's extensive involvement in NMTV's affairs would not raise an issue of de facto control, provided that NMTV's board formally met and adopted NMTV's policies and decisions and that NMTV formalized its relationship with TBN. Tr. 3206, 3226, 3228, 3399-401 3604. This view, however, does not reflect a reasonable interpretation of Commission policy and does not warrant reliance. As set forth above, the Commission requires that the directors actually determine the affairs of the company, not that they merely observe the formalities of doing so.<sup>19</sup> Moreover, even if all of the parties were not totally familiar with all of the Commission holdings concerning de facto control, Crouch, in particular, could not have been unaware that he dominated NMTV, that NMTV was not truly independent of TBN, and that there was no basis to claim otherwise. May also testified that, because the rule permitted nonminority group owners to have a "cognizable" interest in NMTV's stations, this implied that Crouch and TBN could be active in NMTV's affairs. TBF Exh. 105 at 14; Tr. 3227-29, 3398. He further testified that he believed that the Commission's minority policy was intended to encourage nonminorities to give administrative, technical, and financial assistance to minorities and be involved to an extent that otherwise might not be permissible. TBF Exh. 105 at 15-16; Tr. 3204-06, 3226-27. Once again, this reasoning is self-serving and without foundation. Domination of the enterprise by nonminorities, as has been shown here, goes well beyond providing assistance in the form of "investment and support" and gives nonminorities an interest that is far more than merely "cognizable."

---

<sup>19</sup> As noted under the de facto control section, the parties in 1987 eliminated some of the most egregious failures to respect NMTV's separate identity, such as mixing together the accounts of TBN and NMTV. However, these corrective measures were incomplete, and, for example, TBN continued to advance money to NMTV as if NMTV were an owned-and-operated company. See paragraphs 55-59, *supra*.