

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC. File No. BPCT-861219KG

TEXSTAR COMMUNICATIONS, LTD. File No. BPCT-870212KM

FRONTIER BROADCASTING, INC. File No. BPCT-870212KN

FREDERICKSBURG CHANNEL 2 File No. BPCT-870212KP

HAL S. WIDSTEN File No. BPCT-870212KT

STONEWALL BROADCASTING, INC. File No. BPCT-870212KU

For a Construction Permit
For a New Television Station
Fredericksburg, Texas

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1990; Released: January 26, 1990

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN dissenting with separate statement.

1. The Review Board has before it the *Initial Decision*, 4 FCC Rcd 5445 (1989) (*I.D.*) of Administrative Law Judge Edward Luton (ALJ) granting the application of Stonewall Broadcasting, Inc. (Stonewall) for a new television station at Fredericksburg, Texas. Exceptions were filed by Global Information Technologies, Inc., TexStar Communications, Ltd. (TexStar), Fredericksburg Channel 2, and Hal S. Widsten. Stonewall has filed contingent exceptions. Frontier Broadcasting, Inc. failed to file exceptions to the ALJ's denial of its application; therefore, its application will be dismissed pursuant to 47 CFR 1.276(f), for failure to prosecute.

2. Although Stonewall was found by the ALJ to be the superior comparative applicant in this proceeding by virtue of its qualitatively-enhanced 100% integration proposal, it appears, based on the ALJ's findings, that TexStar's comparative proposal may be comparable to Stonewall's. TexStar was awarded 90% quantitative integration credit (it seeks 100%), and its qualitative enhancements include all of the elements awarded to Stonewall, plus minority enhancement which Stonewall

lacks. TexStar correctly points out that Commission precedent holds that where, as here, there is less than a 12.5% quantitative difference in fulltime integration proposals, the preference to be awarded under the integration criterion will depend upon the qualitative differences among the applicants. See *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989). Moreover, even more important, TexStar was awarded a moderate to substantial coverage preference over Stonewall. Thus, TexStar may well prevail in this proceeding if found basically qualified. However, after reviewing the *I. D.* in light of the exceptions and replies, the oral argument held November 27, 1989, and our examination of the record, we believe that a question exists concerning TexStar's financial qualifications which must be resolved before TexStar's application could otherwise be granted. We will, therefore, require TexStar to supplement the existing record before we rule on the pending exceptions.

3. Preliminarily, we note that in numerous recent cases, where the exceptions have challenged the financial qualifications of either the applicant prevailing comparatively in the Initial Decision or, as here, an applicant that ranked sufficiently close, prudence indicated that any gaps in the record should be resolved. Thus, where appropriate, both the Commission, *see, e.g., Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1989); *see also Opal Chadwell*, 4 FCC Rcd 1215 (1989); *Pepper Schultz*, FCC 87I-065, released June 29, 1987, and the Board, *see, e.g., Colonial Communications, Inc.*, FCC 89R-81, released January 4, 1990; *Coastal Broadcasting Partners*, 4 FCC Rcd 7512 (Rev. Bd. 1989), have sought to avoid an unnecessary remand hearing by requiring that the record be supplemented to eliminate, if possible, narrow or ambiguous questions which do not rise to the level of substantial and material questions of fact, which require a formal hearing. *But see Shawn Phalen*, FCC 89R-82, released January 4, 1990 and *JAM Communications*, 4 FCC Rcd 3754 (Rev. Bd. 1989), where the respective records were disturbed by appreciably more, and where a full remand was legally compelled. *Compare Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985) ("totality of evidence arouses a sufficient doubt on the point" that hearing is required) with *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd.) (supplemented financial evidence removed problem), *review denied*, 3 FCC Rcd 4767 (1988). In sum, the Board will call for additional information to eliminate record ambiguities or gaps where the information before it does not indicate that material or substantial questions of fact exist so as to require a formal remand.

4. Here, a narrow question bearing directly on TexStar's financial qualifications arises from review of a letter appended to a motion to enlarge filed by Stonewall on February 18, 1988. That letter, dated April 6, 1987, from Charles D. Lutz, III, President of the North Branch of NBC Bank of San Antonio, Texas, and addressed to TexStar principal Lesvia Guerra-Cox reads as follows:

Dear Ms. Guerra-Cox:

Thank you for letting me know that Mr. Hector Pedregon will be a general partner in TexStar Communications.

I will be happy to sit down with you and Mr. Pedregon to discuss various ways in which we might be able to assist you in meeting your financial needs.

Best of luck in winning the construction permit for Channel 2.

Sincerely,

Charles D. Lutz, III President

5. Prior to the interjection of that letter, Guerra-Cox had certified in the application filed January 12, 1987 as to TexStar's financial qualifications. She had filed that application as a sole proprietor, doing business as TexStar Communications. Subsequently, on April 7, 1987, the "B" cut-off date, TexStar amended its application to report that Hector Pedregon had joined the applicant and that the applicant was now a general partnership. TexStar's application was amended, once again, on January 4, 1988, to show that it was a limited partnership, and that the former general partnership was now the general partner of the restructured applicant. Each amendment has affirmatively represented that there has been no change concerning TexStar's financial certification. TexStar does not here rely on the April 6, 1987 letter in support of its financial qualifications, but instead bases its financial certification on a earlier letter dated February 10, 1987, from the NBC Bank; this letter is in the record, but with its text entirely redacted. Stonewall argues, however, that Pedregon's deposition testimony reflects that the April 1987 letter merely reiterates the understanding that TexStar reached earlier with the NBC Bank when Guerra-Cox filed the TexStar application, and that Stonewall has therefore made a *prima facie* case that TexStar has never had "reasonable assurance" of the requisite financing to construct and operate the proposed station. It contends that the ALJ erred in failing to add financial and related candor issues against TexStar. See *Memorandum Opinion and Order*, FCC 88M-1514, released May 20, 1988 (financial issue rejected).

6. Suffice it to say that, read one way, the April 1987 letter quoted above could readily be construed to suggest that the Bank (at least from the time Pedregon joined the applicant) is merely indicating a generalized interest in financing the applicant. While "reasonable assurance" does not require a legally binding commitment, or a substantive agreement, see *Multi - State Communications, Inc.*, 590 F.2d 1117, 1119 (1978), a mere generalized "interest" in financing the applicant would fall far short of the requisite "reasonable assurance." See *Capital City Community Interest, Inc.*, 2 FCC Rcd 1984, 1986 (Rev. Bd. 1987); see also *Shawn Phalen, supra*, citing *Jay Sadow*, 39 FCC 2d 808 (Rev. Bd. 1973) as a "good example" of a purported bank loan arrangement. TexStar, however, counters that the sole purport of the April letter was the bank's acknowledgement of Pedregon's new position as a partner of TexStar Communications, and that it continues to rely on the original February 10 bank letter, which, it asserts, contains all of the requisite terms for a loan commitment letter. Procedurally, TexStar had no obligation in the absence of a financial issue to show its financial plan until a competing applicant had met its burden of making a *prima facie* case for adding an issue (see *Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1988), *appeal docketed, sub nom. New Life Evangelistic Center Inc. v.*

FCC, No. 89-1256 (D.C. Cir. Nov. 16, 1989)), especially where the bank letter on which it purportedly relies for support of its financial qualifications has not been shown to be inadequate. Nonetheless, with the introduction of the April 1987 letter, it cannot be determined whether the bank considered its original letter (even assuming its sufficiency) outdated, in light of TexStar's subsequent modifications of its ownership structure into a general partnership and, then, into a limited partnership. In this regard, we have a responsibility to "look for fire 'when . . . shown a good deal of smoke.'" *Id.*, quoting *Citizens for Jazz on WRVR v. FCC, supra*, 775 F.2d at 397.

7. TexStar, therefore, is directed to submit to the Board a copy of the original February 10, 1987 bank letter and all documents and related evidence that would support a continuing bank loan commitment, following TexStar's modification of its ownership structure from an individual applicant.

8. ACCORDINGLY, IT IS ORDERED, That TexStar Communications, Ltd. SHALL FILE the documents called for in paragraph 7 within twenty (20) days of the release date of this Order, and,

9. IT IS FURTHER ORDERED, That the competing applicants herein MAY FILE responsive comments within ten (10) days of the date of the filing of the respective documents; and

10. IT IS FURTHER ORDERED, That the application of Frontier Broadcasting, Inc. (File No. BPCT-870212KN) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

DISSENTING STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN

In light of the Board's recently remanded proceedings in *Shawn Phalen*, FCC 89R-82, released January 4, 1990 and *JAM Communications*, 4 FCC Rcd 3754 (Rev. Bd. 1989), it is difficult to fathom the majority's inconsistency and reluctance to remand the instant proceeding, rather than force the examination of additional documents by the Board, with the attendant delay in the resolution of the matter, and the additional costs to the applicants and the taxpayers.

I respectfully submit that there is no "ambiguity" whatsoever in the April 6, 1987 NBC Bank letter submitted by TexStar. It is clear from its face that the bank is willing to only "sit down" and "discuss" with the newly-formed applicant entity how it "might . . . assist" that applicant; no more, no less. Thus, it is manifest that a remand hearing is here legally compelled because substantial and material questions of fact have been raised which, *prima facie*, cast doubt on TexStar's "reasonable assurance" of funds available from the NBC Bank.