IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

PHILADELPHIA TELEVISION NETWORK, INC. Plaintiff, v. READING BROADCASTING, INC. Defendant.	: AUGUST TERM, 2001 : : No. 1663 : : : : (Commerce Program)

O R D E R

AND NOW, this 14th day of July 2005, upon consideration of the evidence presented at a bench trial, the respective proposed findings of fact and conclusions of law and responses of the parties, the respective briefs and memoranda, all matters of record, and in accord with the Findings of Fact, Discussion and Conclusions of Law being filed contemporaneously with this Order, it is **ORDERED** that:

1. Judgment is entered in favor of plaintiff, Philadelphia Television Network, Inc. ("PTN"), and against defendant, Reading Broadcasting, Inc. ("RBI"), on plaintiff's claim of breach of the Time Brokerage Agreement ("TBA").

2. The breach of the TBA constituted a breach of the Option Agreement. Therefore, judgment is entered in favor of plaintiff, PTN, and against defendant, RBI, on PTN's claim of breach of the Option Agreement.

3. The court awards PTN damages resulting from the breach of the TBA as follows:

a) $25,000.00 for payments made to RBI employees from a $500,000.00 advance, in violation of the TBA,

b) $1,418,687.00, representing a *pro rata* credit for the periods of time that the court finds RBI broadcast at below 50 percent ERP, and

c) $6,938,224.00 in lost profits.

4. On PTN's claim for breach of the Option Agreement, the court Orders that each party chose an appraiser, and the two appraisers choose a neutral appraiser and that, among the three, a value of Station WTVE must be determined. Once the station has been assigned a value, PTN is awarded the value of their options minus the second anniversary payment of $296,984.94.

5. The court declines to order specific performance - - that is, reinstatement of the TBA - - in that monetary damages can compensate PTN.

6. With regard to alleged overpayments made by PTN, the court awards PTN:

a) $1,171.00 for the reimbursement of professional association dues, which amount was improperly billed to, and paid by PTN,

b) $80,238.36 for payments made by PTN for the legal services of the Holland & Knight law firm rendered prior to the TBA,

7. The court denies: (a) PTN's claim for alleged payroll overstatements and health insurance charges, (b) PTN's claim for "non-reimbursable" expenses of Michael Parker, Frank McCracken, George Mattmiller and Tom Root, (c) PTN's claim for

charges related to a "non-reimbursable" car, (d) PTN's claim for reimbursement of a $10,000.00 retainer for legal services, (e) PTN's claim for $60,000.00 owed to Verizon, and (f) PTN's claim for reimbursement of the $500,000 advance.

8. Judgment is entered in favor of RBI, and against PTN, on PTN's claim for fraud and deceit.

9. A hearing will be scheduled to permit the parties to present evidence related to the issue of the propriety of pre-judgment interest.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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PHILADELPHIA TELEVISION NETWORK, INC.	:	AUGUST TERM, 2001
Plaintiff,	:	
	:	No. 1663
	:	
v.	:	
READING BROADCASTING, INC.	:	
Defendant.	:	(Commerce Program)

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FINDINGS OF FACT, DISCUSSION
AND CONCLUSIONS OF LAW
SUR BENCH TRIAL

Albert W. Sheppard, Jr., J. ……. July 14, 2005

This case involves a contractual dispute between two broadcasting companies. The court conducted a non-jury trial from February 2 through February 6, 2004 and March 9 through March 23, 2004.[1] Based on the findings of facts and conclusions of law set forth, the court finds in favor of plaintiff.

FINDINGS OF FACT

I. The Parties

1. Plaintiff Philadelphia Television Network, Inc. ("PTN") is a Pennsylvania corporation, which owns and operates Channel 7. Channel 7 is a low powered station that reaches some areas of Philadelphia as well as a portion of Southern New Jersey. N.T. 3/6/2005 at 8.

2. Defendant Reading Broadcasting, Inc. ("RBI") is a Pennsylvania corporation which, pursuant to a Federal Communications Commission ("FCC") license,

[1] The plaintiff and the defendant filed Proposed Findings of Fact and Conclusions of Law on August 30, 2004 and September 1, 2004, respectively.

operates a full power television station, WTVE, Channel 51, Reading, Pennsylvania (the "Station"). Exh. P-230, ¶¶ 2-3.

3. Michael L. Parker was the President of RBI at the time the operative Time Brokerage Agreement ("TBA") and the Option Agreement were signed. N.T. 3/12/2004 at 99-102; N.T. 3/16/2004 at 134. In addition, Mr. Parker owns or controls over 40 percent of RBI's stock. Exh. P-226; N.T. 2/2/2004 at 59.

4. Michael Parker resigned as President and a member of RBI's board in May, 2001. Mr. Parker placed his stock in trust. N.T. 3/16/2004 at 66-67; PTN's Proposed Findings of Fact and Conclusion of Law ("FFCL") at ¶ 7.

5. Upon Michael Parker's resignation, Frank McCracken became RBI's highest ranking officer. Mr. McCracken was the President and General Manager of RBI. N.T. 2/2/2004 at 53; PTN's FFCL at ¶ 10.

6. David Kase was, at all material times, RBI's Assistant Chief Engineer. Exh. P-266.

7. Gibson White was, at all material times, RBI's Chief Engineer. N.T. 3/18/2004 at 44.

8. Thomas Root was, at all material times, RBI's Director of Special Projects. Exh. P-266, ¶ 8.

9. Richard H. Glanton is the Chairman of PTN. Mr. Glanton played an extensive role in the negotiations and interactions that led up to the execution of the TBA and the Option Agreement. N.T. 2/6/2004 at 4.

10. Eugene Cliett is the President of PTN and, at all material times, oversaw PTN's day-to-day operations. N.T. 2/6/2004 at 14-15; N.T. 3/10/2004 at 84.

II. The Station

11. WTVE, Channel 51, RBI's full power broadcast television station, is in the Philadelphia designated marketing area ("DMA"). N.T. 2/2/2004 at 56; N.T. 2/6/2004 at 17; Exh. P-19.

12. As a full power station, WTVE has so-called "must carry" rights under FCC regulations, which obligate all cable providers in the station's DMA to carry the station's programs.[2] N.T. 2/6/2004 at 9, 16-18; N.T. 3/11/2004 at 17.

13. At all material times, RBI's transmitter – the RCE TTU 60 – used klystron transmitter tubes as the final amplifier tubes. In normal operation the transmitter operated on 3 tubes – with 2 tubes used to amplify the visual signal and 1 tube to amplify the aural signal. N.T. 2/5/2004 at 13-14, 51; Exh. P-220, pp. 6-7.

14. Single-tube emergency multiplex mode is a mode of operation in which the transmitter is reconfigured so that the audio and visual signals are transmitted through one tube, bypassing certain components of the transmitter. N.T. 3/18/2004 at 85-87.

15. The Station is licensed by the FCC to broadcast at a maximum visual effective radiated power ("ERP") of 1450 kilowatts. N.T. 3/18/2004 at 18, 85-87; Exh. P-27.

16. ERP is defined by the FCC as "the product of the power supplied to the antenna multiplied by the gain of the antenna referenced to a half-wave dipole." 47 C.F.R. 1907.

[2] 47 USCS § 534. **Carriage of local commercial television signals** (a) Carriage obligations. Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. . . .

III. Background Related to the Contractual Relationships Between the Parties.

17. Beginning in 1994, RBI's television license was up for renewal before the FCC. Under the "comparative renewal" procedures then in effect under FCC rules, a competing entity, Adams Communications Corporation, challenged the renewal of RBI's license and filed an application with the FCC seeking to have RBI's existing television license for Channel 51 awarded to Adams. N.T. 3/12/2004 at 114-16; N.T. 3/17/2004 at 115-17.

18. RBI engaged the law firm of Holland & Knight to represent it in the FCC license renewal proceedings. By the fall of 1999, the license renewal proceedings had already been pending for several years, and were about to proceed to a series of evidentiary hearings before an FCC Administrative Law Judge ("ALJ"). N.T. 3/12/2004 at 114-16, 121-22.

19. By mid to late 1999, RBI had already incurred substantial legal fees in connection with the FCC license renewal proceedings, and was about to incur substantial additional legal fees and costs for the evidentiary hearings before the ALJ. Because of RBI's distressed financial condition, it already owed Holland & Knight several hundred thousand dollars in past legal fees. Holland & Knight were threatening to withdraw from further representation of RBI unless an effort was made to reduce the outstanding debt. N.T. 3/16/2004 at 41-42; N.T. 3/17/2004 at 145-47.

20. Finding a way to pay the legal fees to continue the FCC license renewal proceedings was critically important to RBI's survival because the FCC license was RBI's most valuable and significant asset. N.T. 3/12/2004 at 156-57; N.T. 3/16/2004 at 157-58.

21. Richard Glanton expressed an interest in purchasing the Station from RBI. However, under FCC rules and regulations, the Station could not be sold with the "comparative renewal" license challenge pending. N.T. 3/10/2004 at 19-20.

22. In lieu of purchasing the station outright, PTN expressed an interest in acquiring an option to purchase less than 50 percent of RBI's stock. Such a deal would not run afoul of the FCC's prohibition of a change in control of the station while the license renewal was pending. N.T. 3/12/2004 at 122-24; N.T. 3/10/2004 at 19-20; 90.

23. In order to effectuate PTN's intention to ultimately purchase the Station, PTN entered into a Time Brokerage Agreement ("TBA") giving PTN the right to program the station, and an Option Agreement that allowed for the purchase of approximately 40 percent of the Station stock options upon the resolution of the FCC license renewal challenge. Exhs. P-1; P-3.

IV. The Time Brokerage Agreement

24. The parties entered into the first Time Brokerage Agreement ("TBA") on October 13, 1999. Exh. D-20.

25. The parties entered into the second TBA on November 1, 1999. Exh. D-7.

26. The first two versions of the TBA stated that "[t]hroughout the term of this Agreement, unless otherwise agreed to by the parties hereto, [PTN] shall program the Station so as to maintain a general, advertiser supported format. The Station shall not become predominantly a home shopping, religious, foreign language and/or infomercial station." Exhs. D-6, § 10; D-7, § 10.

27. The parties executed the final TBA on November 16, 1999. Exh. P-1.

28. In the November 16th version of the TBA, Section 10 stated that "[PTN] shall program the Station so as to maintain a general, advertiser supported format."[3] Exh. P-1.

29. This final version of the TBA did not include the requirement that "the Station shall not become predominantly a home shopping, religious, foreign language and/or infomercial station." [4] Id.

30. According to Schedule 3.1 of the TBA, PTN was to advance $500,000.00 to RBI, the first payment being a $100,000.00 "non-refundable" deposit. Within five business days after Commencement Date, PTN was obligated to make further payments, "not to exceed Four Hundred Thousand Dollars ($400,000.00) in the aggregate" to pay outstanding obligations. Id., Schedule 3.1.

31. PTN did in fact pay RBI $500,000.00. Exh. P-109; N.T. 3/19/04 at 8.

32. Schedule 3.1 provided that RBI was to furnish PTN with an accounting related to the advance. Schedule 3.1 specifically provides:

> Within 5 business days after the Commencement Date [PTN] shall make advances to [RBI] for the purposes of paying documented outstanding, past due balances on debt service for the Massey obligation and other accounts payable not to exceed $400,000 in the aggregate. All of the foregoing amounts paid by [PTN] to [RBI] shall be used by the [RBI] solely, exclusively and promptly to pay outstanding debt service obligations, legal fees and accounts payable and expenses, and *[RBI] shall provide [PTN] with satisfactory evidence thereof.*

(emphasis added).

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[3] The term "general advertiser supported format" is not defined in the TBA. Additionally, it has not been defined in any article, publication, book or other source nor has it been the subject of FCC regulation or comment as far as the parties are aware. Exh. P-1; N.T. 2/6/2004 at 152; N.T. 3/10/2004 at 55.

[4] Thomas Hutton, RBI's FCC counsel, requested the changes because he "was concerned about [RBI] signing a contract during the renewal case that made it look like we were criticizing home shopping or infomercial programming". N.T. 3/17/2004 at 133. The issue of home shopping programming was before the ALJ in the FCC license renewal challenge. RBI's position before the FCC was that there was nothing wrong with home shopping programming. Id. at 133-134.

33. RBI did not provide PTN with an accounting of the $500,000.00 up until the time RBI terminated the TBA. N.T. 2/4/2004 at 67.

34. The additional pertinent sections of the TBA are discussed, *supra*, in their respective contexts.

V. The Option Agreement

35. The Option Agreement was entered into by the parties, effective the same date as the second version of the TBA. Exhs. P-3; D-7.

36. Section 2.1 of the Option Agreement states:

> (a) Option Grant. In consideration of the sum of One and 16/100 Dollars ($1.16) per share paid to Sellers and the execution and delivery of the Time Brokerage Agreement and the amounts paid to Company (sic) thereunder this date, the Sellers hereby grant to Buyer an option . . . to purchase the Shares subject to the terms and conditions of this Agreement, upon the payment of the Purchase Price on the Closing Date at the Closing place. . . .

Exh. P-3.

37. Pursuant to the Option Agreement, PTN had the right to seek to acquire options up to 49 percent of RBI's stock. Exh. P-3, § 2.1(c).

38. PTN optioned approximately 40% of RBI's shares. Exh. P-3.

39. PTN could not exercise its options until the License Renewal Challenge was resolved in RBI's favor, at which time PTN had a 90 day exercise period. Id., § 2.3.

40. The FCC ultimately granted the renewal of RBI's License[5] and the United States Court of Appeals for the District of Columbia Circuit affirmed. N.T. 3/17/2004 at 119; Adams Communications Corp. v. Federal Communications Comm., 81 Fed. Appx. 358 (D.C. Cir. 2003) (rehearing en banc denied Feb. 3, 2004). While Adams filed a

[5] N.T. 3/17/2004 at 118.

petition for certiorari to the Supreme Court, all parties agree that it is "inconceivable" that certiorari will be granted. 3/17/2004 at 119; P-266, ¶ 26.

41. As of the start of this trial, PTN's time to exercise its Option had not commenced. N.T. 2/6/2004 at 44.

42. The Option Agreement references the TBA:

> WHEREAS, As of the date of this Agreement the Buyer and the Company have entered into a time brokerage agreement regarding Station (the "Time Brokerage Agreement"), and as a condition and in consideration of the effectiveness of the Time Brokerage Agreement the Buyer and Sellers have agreed to enter into this Agreement. . . .

43. A First Amendment to Option and Stock Purchase Agreement was entered into between the parties in March, 2000. Exh. D-5

44. This Amendment provides in pertinent part:

> WHEREAS, the parties desire to amend the Option Agreement to limit the representations, warranties and covenants made by the Sellers [RBI] and to provide that only the Warranting Sellers will make all of the representations, warranties and covenants of the Sellers set forth in the Option Agreement,
>
> . . . .
>
> 1. Definition Amendments. The following definitions set forth in Section 1.1 of the Option Agreement are hereby amended as follows:
>
> . . . .
>
> (b) The following new definition is hereby added:
> "Warranting Sellers" shall mean Michael L. Parker, Partel, Inc., and The Clymer Estate Reduction Trust.
>
> 2. Amendment to Representation and Warranties. Article III of the Option Agreement is amended to provide that the *Warranting Sellers and the Company* jointly and severally make the representations and warranties to Buyer set forth therein . . . .

Id. (emphasis added).

45. In addition, the Amendment to the TBA also referenced the Option Agreement:

> Entire Agreement. Other than the Option Agreement, the TBA and this Amendment represent the sole and entire understanding and agreement between the parties with respect to the subject matter of the TBA. The TBA, as amended herein, supersedes all prior negotiations and understanding between the parties whatsoever all letters of intent and other writings relating to such negotiations, understands.

Id.

VI. The December 1, 1999 "Supplemental Agreement"

46. At the time that PTN and RBI entered into the TBA in late 1999, one of the large focusing magnets was inoperable. As a result, the transmitter was operating in emergency multiplex mode. N.T. 3/12/2004 at 141; N.T. 3/16/2004 at 7-9, 16, 64-65; N.T. 3/17/2004 at 9-17.

47. In addition to the issue of power, PTN was not in a position to operate master control, as was contemplated at the beginning of the relationship between PTN and RBI. N.T. 3/12/2004 at 19-20; 137-38; N.T. 3/16/2004 at 58.

48. On December 1, 1999, Michael Parker wrote to Richard Glanton regarding two issues (1) the power issue and (2) RBI maintaining the operation of master control. Mr. Parker's characterized this correspondence as a "supplemental agreement."[6] He wrote:

> Thus, we previously agreed that the following additional or supplemental terms would govern the relationship between Reading Broadcasting, Inc. ("Licensee") and Philadelphia Television Network, Inc. ("Broker") under the *Time Brokerage Agreement* executed between the parties on or about Monday, November 1, 1999 ("TBA").[7]

Exh. P-23.

[6] Mr. Parker's signature is the sole signature on this "supplemental agreement."
[7] Mr. Parker is referencing the second version, not the final version of the TBA.

49. This "supplemental agreement" provided that RBI would "continue to employ sufficient master control operators, supervisors, management level personnel, custodial and ministerial personnel to operate commercial television station WTVE . . . 24 hours daily." Id.

50. In addition, the "supplemental agreement" also provided that:

> [i]n addition to reimbursement of expenses agreed to in the TBA, [PTN] shall reimburse [RBI] for all expenses associated with employment of the personnel described in Paragraph 1 of this letter, on the same terms and conditions as reimbursement is made for other expenses under the *TBA*. The expenses to be incurred in providing the MCO services and other services required by PTN shall be in the reasonable discretion of RBI. PTN shall give RBI prompt notice of any costs associated with the provision of this service which it may dispute.

Id.

51. PTN paid the salaries of RBI's master control operation's staff without objection. N.T. 3/22/2004 at 48.

VII. Amendment to Time Brokerage Agreement

52. On January 31, 2000, a formal Amendment to the TBA was entered into by the parties. The amendment spoke to the issue of the inoperable magnet and the consequential power issues, as well as an increase in the hours reserved to RBI. Exh. P-2.

53. This Amendment to TBA states in pertinent part:

> 1. Hours Reserved to Licensee. Notwithstanding any other provision of the TBA, up to six (6) hours per week shall be devoted to [RBI's] programming, at the times [RBI] has elected to reserve to itself as set out in Schedule 1.1, attached to this Amendment and incorporated herein by reference as if set out fully herein. [RBI] and [PTN] agree that the Schedule 1.1 attached to the TBA is replaced fully by Schedule 1.1 attached hereto.[8]

[8] Under Schedule 1.1, the time reserved for RBI's programming was Saturday from 08:30 local time until 11:30 local time, and Sunday from 08:30 local time until 11:30 local time.

2. Licensee Operations. [PTN] acknowledges that [RBI's] transmitter has not been operating at full power due to an electromechanical breakdown of a magnetic part of the transmitter since prior to the commencement of the effectiveness of the TBA. [PTN] further acknowledges that [RBI] has removed the broken transmitter magnetic components and has arranged for the components to be repaired if possible or replaced if repair is infeasible. [PTN] agrees that, notwithstanding any other provision of the TBA, [RBI] shall not be deemed to be in Default under the TBA because of its failure to operate at the maximum transmitter power authorized by the FCC since the effective date of the TBA. [PTN] further agrees that [RBI] shall not be deemed to be in Default under the TBA from the date of this Amendment forward for failure to operate the transmitter at the maximum transmitter power authorized by the FCC because of the broken transmitter magnetic components, and that such failure shall be deemed to be an event of Force Majeure within the meaning of Paragraph 16 of the TBA. As such a Force Majeure event, [RBI] has an obligation to repair the broken transmitter magnetic components promptly, and this waiver shall not extend to any failure of [RBI] to operate its transmitter at fully authorized power for any reason other than due to the broken transmitter magnetic components. [PTN] agrees that it will pay all expenses of repair or replacement of the broken transmitter magnetic components . . . .

. . . .

6. Entire Agreement. Other than the Option Agreement, the TBA and this Amendment represent the sole and entire understanding and agreement between the parties with respect to the subject matter of the TBA. The TBA, as amended herein, supersedes all prior negotiations and understandings between the parties whatsoever all letters of intent and other writings relating to such negotiations, understandings.

Exh. P-2.

VIII. Power Issues

54. On December 23, 2000, the Station suffered a fire that destroyed all three existing transmitter tubes, and the Station was off the air until December 29, 2000. Exhs. P-88; P-266, ¶ 24.

55. Gibson White, the Station's chief engineer, represented that the transmitter was a total loss when RBI submitted its insurance claim in connection with the transmitter. N.T. 3/15/2004 at 93.

56. From the time that the Station resumed broadcasting after the fire until RBI commenced broadcasting using a new transmitter on or about October 2, 2001, the Station operated in single-tube emergency multiplex mode. Exh. P-266, ¶ 25.

57. In addition, the Station operated in single-tube emergency multiplex mode from January 1, 2000 through March 23, 2000, and from March 23, 2000 through May 6, 2000. The Station was off the air from May 8, 2000 at 19:28 until the morning of May 11, 2000. The Station operated in single-tube emergency multiplex mode from May 11, 2000 through August 4, 2000, from August 7, 2000 at 11:00 until the morning of August 25, 2000, and from August 25, 2000 at 23:10 until October 2, 2000 at 08:00.
Exh. P-266.

58. The Klystron tubes that were in service between December 29, 2000 and July 29, 2001, while RBI was operating in single-tube emergency multiplex mode, were "soft" tubes. N.T. 3/18/2004 at 99.

59. A "soft" tube cannot achieve full power. N.T. 3/12/2004 at 156-57; N.T. 3/22/2004 at 71-72.

60. On August 2, 2001, the "soft" tube was replaced with a good, slightly used Klystron tube that produced full rated power on August 2, 2001. Exh. P-220, p. 54.

61. This "good" tube was in use from August 3, 2001 to August 6, 2001. Id., at p. 55.

62. In a January 3, 2001 application to the FCC for a special Temporary Authority to operate for an extended time in emergency multiplex mode, RBI stated that "WTVE is operating at 30,000 watts TPO visual (about 565,000 watts ERP), but it may not be possible to maintain that power level." Exh. P-88.

63. According to Sidney Shumate, plaintiff's expert with regard to power, 565,000 watts ERP is 39 percent of full licensed ERP. Exh. P-220, at 57.

64. In describing measures he took to achieve transmission after the fire, Gibson White told the insurance company via letter: "We were successful in getting the exciter and IPA on air at, approximately, 30 watts total power out into the antenna. We then proceeded to work at getting one tube on in multiplex mode at 78 percent of ½ power or about 4DB down or 40 percent of full power." Exh. P-87.

65. In a January 23, 2001 e-mail, Gibson White contacted the insurance company stating: "[a]ll the tubes in the transmitter have been checked and none of them work. The tube in place now was a "spare" tube that has not been able to achieve full power for years. It was around just for this case, an emergency "spare". Exh. P-88.

66. In April, 2001, David Kase, the assistant engineer for RBI, told Eugene Cliett, the President of PTN, that RBI was broadcasting at 20 percent of RBI's ERP.[9]

67. After Mr. Cliett's conversation with Mr. Kase, PTN expressed concerns to RBI regarding WTVE's ERP. PTN informed RBI that they did not believe that WTVE was transmitting at 50 percent ERP. In response to these concerns, Mr. White e-mailed Tom Root on July 29, 2001 regarding "WTVE transmitter configurations" stating:

> [t]here is concern on my part that we may not be running at the full 50% power output as we have implied with figures and such. There are many variations in all high power klystron tubes and the gain factor of each can vary widely. I believe we are close to the 100% output of the tube however until I can measure it directly with my calibrated wattmeter and load (which are at the transmitter site right now) I cannot say for sure what the exact gain of the tube and the true output might be. The tube TV51 is currently working was to be a loaner tube, as it was known to have lower gain than normal. And it will not allow the beam voltage to go much higher than it is now before it "trips" the protection circuits.

Exh. P-45.

68. However, Mr. White testified that, with the exception of the week immediately following the December, 2000 fire, the Station operated at or exceeded 50 percent ERP. N.T. 3/18/2004 at 87-88, 97-98.

69. PTN's expert, Sidney Shumate, an engineer, concluded in his report that WTVE transmitted at significantly less than 50 percent ERP. Mr. Shumate based his conclusion upon an indirect method of analysis, and an analysis of ERP based upon the Station power bills.[10] Exh. P-220.

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[9] Mr. Kase's analysis of WTVE's ERP was disputed by RBI. Mr. Kase testified at trial that he recalled Mr. White explaining why his number was wrong. When asked if he agreed with Mr. White, Mr. Kase testified: "I don't honest to God know if I said that I agreed with him. It made sense, yes, and like I said, he knows more about it than I do so on that fact alone, I would agree with him. If we have a disagreement, he is my boss plus he knows more than me, so yeah, I would go along with what he said." N.T. 3/18/2004 at 11.

[10] For a complete discussion of Mr. Shumate's calculation, see his report at Exh. P-220.

IX. PTN's Programming

70. Starting on January 1, 2000, PTN's format was all news from 05:00 to 22:00, Monday through Friday, with home shopping in the overnight hours. N.T. 2/6/2004 at 47, 64. On the weekends, PTN's programming format consisted solely of infomercials and home shopping. N.T. 2/6/2004 at 64; N.T. 3/9/2004 at 9-10.

71. In the fall of 2000 - - prior to the fire - - PTN decided to discontinue its "all news" format and to roll out a new format dependent on syndicated programming and locally produced entertainment. N.T. 2/6/2004 at 57-58.

72. PTN found that producing the news was too expensive. Id. at 57.

73. In November, 2000, PTN advised Parker, McCracken and Root of the upcoming changes in PTN's programming format and that the changes would take 60 … 90 days to implement. Exh. P-237; N.T. 2/4/2004 at 128; N.T. 2/6/2004 at 58.

74. Soon after the fire, the parties agreed to waive the programming requirements set out in Section 10 of the TBA. N.T. 3/17/2004 at 42; N.T. 2/3/2004 at 135. By letter dated February 13, 2001, Michael Parker advised Richard Glanton that RBI was "willing to permit PTN to carry more than 12 hours daily of infomercials, home shopping and paid religion, so as to maintain [PTN's] revenue stream and not cause any loss to you because of the transmitter fire." However, he further stated that PTN was put "on notice" that "the amount of time which PTN devotes to infomercials, home shopping or paid non-local religious programming must be decreased to 12 hours daily *as soon as RBI's new transmitter is installed . . .*" Exh. P-4 (emphasis added).

75. Despite this waiver, on July 3, 2001, RBI sent PTN a programming default notice. This default notice culminated in RBI taking PTN off the air on August 6, 2001.

X. Default Notices

76. Although there had been several monetary default notices sent to PTN between February, 2000 and June, 2001,[11] on July 3, 2001, RBI issued two additional default notices to PTN, one of which eventually led to RBI's termination of the TBA and consequently its removal of PTN's programming from the air. Exhs. P-5; P-6.

77. One of the July 3, 2001 default notice related to monies allegedly owed to RBI by PTN. Exh. P-6.

78. PTN, by letter dated July 27, 2001, invoked its right to arbitrate the monetary dispute pursuant to Section 39 of the TBA. Exh. P-9.

79. Rather than terminate the TBA on the basis of the monetary default, RBI terminated the TBA based on the programming default notice. N.T. 2/2/2004 at 77.

80. Relying on an alleged conversation between Michael Parker and Richard Glanton wherein PTN waived its entitlement to credits as a *quid pro quo* for RBI's programming waiver, RBI believed that it had the right to default PTN based on its programming because PTN had complained about RBI's ERP. Mr. Parker described the oral agreement thus: "we would not complain about the programming, and PTN would not complain about the power." N.T. 3/16/2004 at 27-28, 83-89.[12]

81. The programming default notice stated in pertinent part:

> *[b]ecause RBI suffered a catastrophic fire in December 2000 which has caused the station to operate with less power since that time while a new transmitter is installed, RBI has been forbearing making any demands that PTN comply with the requirements of the Time Brokerage Agreement. This forbearance was gratuitous, because the structure of our temporary transmitter situation has been such that WTVE has been operating with 50% power.*

[11] Exhs. P-148 through P-151; P-153 through P-156; P-159.

[12] Mr. Glanton testified that the parties had no discussion whatever concerning the subject of credits and PTN did not agree to waive its entitlement to credits under Section 7.B of the TBA. N.T. 3/10/2004 at 113.

> *Recently, however, Eugene L. Cliett informed us that PTN disputes amounts it owes under the Time Brokerage Agreement on the spurious basis that it suspects that WTVE is operating at less than 50% power. PTN has no basis for this allegation. What its so-called dispute has made clear is that there is no reason for RBI to forbear from exercising its right to have PTN adhere to the programming requirements of Paragraph 10.* PTN's representation that it would provide locally-produced programming of high quality was a material inducement to RBI to enter into the *Time Brokerage Agreement*. Contrary to our written warning to you on November 30, 2000, PTN has increased its paid programming content to well over 80% of its program day.

Exh. P-5 (emphasis added).

82. On August 6, 2001, RBI took PTN off the air. N.T. 2/2/2004 at 72.

83. On November 16, 2001 Frank McCracken wrote to Richard Glanton, advising him that on November 15, 2001, PTN was obligated under the Option Agreement to make a payment to Sellers of $0.58 per Share on the second anniversary of the Option Agreement. The second anniversary of the Option Agreement was November 15, 2001. He wrote:

> [t]herefore, pursuant to Section 10.1(c) of the Option Agreement, please be advised: (a) that the failure of the Buyer to make the payment required to be made on November 15, 2001, as required by Section 2.1(b) of the Option Agreement, constitutes a breach or default in the performance of the Buyer's obligations under the Option Agreement, (b) that notice of such a breach or default in the performance of the Buyer's obligation is hereby given to you, and (c) that if Buyer does not cure this breach or default in its performance within thirty (30) days from the date of this notice, then the Option Agreement will be terminated pursuant to the provisions of Section 10.1(c) of the Option Agreement.

Exh. P-176.

84. In response to RBI's option default letter, PTN, through counsel, took the position that PTN was excused from having to make the option payment as a result of

breaches on the part of RBI and its shareholders, citing the TBA and the Option Agreement in support of its position. Exh. P-178.

XI. Damages

85. PTN claims that they are owed damages for (1) revenues improperly retained by RBI,[13] (2) expenses that were incorrectly paid by PTN,[14] (3) PTN's *pro rata* credit due on account of WTVE's broadcasting below 50 percent ERP,[15] (4) damages for failure to return equipment,[16] (5) damages for liabilities to third parties,[17] (6) damages related to the $500,000.00 advance,[18] (7) lost profits,[19] (8) reinstatement under the TBA,[20] and (9) option damages.[21]

Revenues

86. Under the terms of the TBA, RBI reserved four hours per week for the broadcast of RBI's own programming. Exh. P-1, Schedule 1.1.

87. Pursuant to the Amendment to the TBA, the broadcast time reserved for RBI increased to six hours. Exh. P-2 at ¶ 1; Amended Schedule 1.1.

88. RBI, in accordance with its rights under the TBA and the Amendment to the TBA, sold its rights to broadcast programming during the hours reserved to RBI to other broadcasters and RBI retained those revenues. N.T. 3/16/2004 at 42-44.

89. Eugene Cliett testified at trial that those revenues belonged to PTN. N.T. 3/9/2004 at 122.

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[13] PTN's FFCL at ¶ 227.
[14] Id. at ¶ ¶ 206, 210, 213, 215, 216.
[15] Id. at ¶ 204.
[16] Id. at ¶¶ 228-229.
[17] Id. at ¶ 230.
[18] Id. at ¶ 205.
[19] Id. at ¶ 222.
[20] Id. at ¶ 231.
[21] Id. at ¶ 236.

90. While section 6 of the TBA provides that "[PTN] shall have the exclusive right to sell, either directly or indirectly through sales representatives, and shall be solely responsible for billing and collecting payments for, all programming and commercials aired on the Station . . . on and after the Commencement Date until the termination of this Agreement", [22] the TBA also provides that PTN only had the right to "sell commercial and other time on the Station and bill for and collect payments for *time sales on the Station by [PTN] . . .*" [23] , and that "[p]rogramming currently *under contract to [RBI] (or any of its Affiliates) for the Station will remain so.*" Exh. P-1, Section 4 (emphasis added).

91. In addition, Section 4 of the TBA states:

> [d]uring the term of this Agreement, [RBI] shall be responsible for honoring and performing all commercial time sales agreements for the Station, including barter programs, during the time on Station (sic) reserved for [RBI's] use (a) in existence as of the Commencement Date and (b) entered into in the ordinary course of business, consistent with prior practices, after the Commencement Date by [RBI].

Id. P-1.

Expenses

92. PTN's expert, William Redpath, in his report claims that PTN was improperly billed $642,763.28. This amount represents payroll overstatement, health insurance related to the employees whose salaries were improperly billed to PTN, certain professional association dues, charges for a "non-reimbursable" car, an overpayment to Holland & Knight, "non-reimbursable" charges of Tom Root, George Mattmiller, Frank McCracken, and Michael Parker, a retainer for the Telemundo litigation and Michael Parker's legal expenses. Exh. P-221.

[22] Exh. P-1, Section 6.
[23] Id. P-1, Section 1 (emphasis added.)

93. The reimbursement for the salaries of these individuals was covered in a correspondence written by Michael Parker to Richard Glanton. Exh. P-23.

94. The salaries and benefits at issue were to be paid "in the reasonable discretion of RBI." Id. P-23.

95. In addition, the December 1, 1999 supplemental agreement relating to PTN's obligations respecting RBI's Master Control Operation's staff provided a mechanism by which PTN could challenge "any costs associated with the provision of this service which it may dispute." Id. P-23.

96. PTN paid these salaries and benefits without objection. N.T. 3/22/2004 at 48; RBI's FFCL at ¶ 501.

Professional Association Dues

97. As to the professional association dues that PTN claims as an item of damages, the TBA provides that PTN was obligated to pay RBI's annual dues for the Pennsylvania Association of Broadcasters. Exh. P-1, Schedule 3.2.

98. The dues at issue are not related to the Pennsylvania Association of Broadcasters. Exh. P-220.

The Second Car

99. PTN claims that they were improperly billed for a second car when the TBA only provided that it pay for one car. Exh. P-1, Schedule 3.2.

100. However, the supplemental agreement that was honored by PTN, called for the reimbursement of "*expenses* to be incurred in providing the MCO (Master Control Operations) services and other services . . . in the *reasonable discretion of RBI*." Exh. P-23 (emphasis added).

Holland & Knight "Overcharges"

101. PTN claims that they overpaid for services rendered by the Holland & Knight firm for RBI's defense in the FCC litigation. Exh. P- 221.

102. PTN and RBI entered into a supplement agreement related to PTN's reimbursement of Holland & Knight charges. Exh. D-48.

103. This agreement called for PTN to pay a specific amount related to Holland & Knight's services, regardless of what Holland & Knight billed for a specific month. The agreement stated that "payments made by PTN against RBI's fees prior to November 15 would constitute a loan to RBI, which will be repaid at the time an assignment of the license of WTVE takes place." Id. D-48.

Tom Root, George Mattmiller, Michael Parker and Frank McCracken's Expenses

104. PTN makes a claim for alleged improperly billed charges incurred by Tom Root. PTN's FFCL at 56; Exhs. P-133; P-221.

105. A portion of these charges related to trips to Seattle. Exh. P-221.

106. Evidence was presented at trial that indicated these trips involved Mr. Roth reviewing documents regarding the Telemundo litigation that were in the possession of Michael Parker, who resides in Seattle. N.T. 3/22/2004 at 50-51.

107. Under the TBA, RBI's expenses that related to the Telemundo litigation were to be reimbursed by PTN. Exh. P-1, Schedule 3.2.

108. PTN also makes a claim for Tom Root's reimbursed expenses for the purchase of two computers. Exh. P-221.

109. PTN did not present any evidence that they challenged the legitimacy of these expenses prior to the termination of the TBA despite the supplemental agreement's express mechanism by which PTN could have disputed these charges. Exh. P-23.

110. PTN claims that they are owed $32,288.76 due to of Tom Root's alleged improper charges. Exh. P-221. However, Mr. Redpath, did not break down in his report the specific dollar amounts attributable to the computers, the trips to Seattle and local telephone expenses for Mr. Root in Ohio. Exh. D-221.

111. PTN claims that it is due $6,014.99 for projects RBI's general manager, George Mattmiller, worked on for Michael Parker, two, two-week trips to Seattle and expenses incurred in attending the National Association of Television Executives ("NAPTE") and the National Association of Broadcaster ("NAB") conference. Exhs. P-129; P-130; P-221.

112. The Seattle trips were related to the Telemundo litigation. N.T. 3/22/2004 at 50-51.

113. The TBA provided that PTN was obligated to reimburse RBI for litigation expenses. Exh. P-1.

114. Regarding the projects Mr. Mattmiller worked on for Michael Parker, there was no evidence submitted at trial that quantifies what amounts were paid by PTN related these projects.

115. Regarding PTN's claim for expenses for attendance at the NATPE and NAB conferences, there was no evidence submitted that specified the exact dollar amounts paid for these improper charges.

116. According to Mr. Redpath's report, RBI improperly billed PTN $2,811.08 for expenses of Michael Parker's "for which no business purpose was documented." Exh. P-221.

117. Mr. Redpath opined that RBI improperly billed PTN for two Las Vegas trips and a trip to Pennsylvania for which no business purposes were stated. Id.

118. However, PTN did not introduce evidence that these expenses were not covered by the TBA.

The Schnader Harrison Firm's Legal Retainer

119. Mr. Redpath included in his itemization of "overcharges" a $10,000.00 retainer paid to the Schnader Harrison law firm for the Telemundo litigation. Exh. P-221.

120. Mr. Redpath opined that this charge was improper as it was a "retainer" and presumably not a payment for the performance of legal services. Id.; N.T. 3/11/2004 at 76.

121. Frank McCracken testified that the $10,000.00 was applied to later bills and was therefore used to pay for legal services. N.T. 3/22/2004 at 51-52. This evidence was not challenged.

The Verner Liipfert Law Firm Fees

122. Mr. Redpath's last item of damages was for an alleged improper charge in the amount of $21,473.75 to the Verner Liipfert law firm which had been retained by Michael Parker in connection with the FCC re-licensure proceedings. N.T. 3/16/2004 at 99-101; Exhs. P-221; D-107.

123. The ALJ that issued the initial decision in the FCC re-licensure proceedings specifically found Mr. Parker to be "unqualified" to hold any position of control in connection with RBI's license. Exh. P-277, ¶¶ 253-54.

124. The ALJ held:

> In deciding this case, Parker is found to be "unqualified" to control RBI's license because of his unauthorized taking of control, his failures to report timely and accurately, and particularly because of his false answers to Question 4 denying "fraud", his causing the misrepresented Dallas amendment to be filed and his lacking candor in his hearing testimony. Mr. Parker also is found to be "disqualified" from benefiting from any settlement that might be achieved between RBI and Adams."

Id. at p. 79.

125. RBI informed PTN that "with RBI's and Mr. Parker's interests flowing in concert, his counsel's input is quite likely to benefit our cause as well as Mr. Parker's." Exh. D-100.

The Time Brokerage Agreement's Section 7 *Pro Rata* Credit

126. With regard to PTN's claim regarding the *pro rata* credit due PTN in the event that WTVE broadcasted at less than 50 percent ERP, Eugene Cliett testified that the amount due PTN on account of PTN's not receiving credit under Section 7B of the TBA, is $1,418,687.00. N.T. 2/6/2004 at 97; Exh. P-246; PTN's FFCL at § VII, ¶ 1.

127. Sidney Shumate, PTN's expert, opined that WTVE transmitted at less than 50% ERP. Exh. P-220.

"Misappropriated" Equipment

128. PTN claims that they are due reimbursement for equipment allegedly "improperly" retained by RBI. Exh. P-254.

128. PTN acquired television production equipment financed through Sony Finance Services. N.T. 3/12/2004 at 59.

129. This equipment was located at RBI's studios in Reading. N.T. 3/22/2004 at 36.

130. After the TBA was terminated, RBI learned that PTN was in arrears in its payments to Sony Financial and that Sony Financial had sued PTN in federal court in Philadelphia. Sony obtained a default judgment against PTN as PTN did not answer Sony's complaint. N.T. 3/12/2004 at 60-61; Exh. D-176.

131. The Order entered against PTN gave Sony the right to repossess the equipment that it had leased to PTN. Exh. D-176.

132. When Sony Financial contacted RBI regarding their repossessing the equipment, RBI negotiated with Sony Financial to acquire the equipment. Exh. D-177.

PTN's Debt to Verzion

133. PTN maintains that as a result of RBI's wrongful termination of the TBA, there were unable to pay Verizon an outstanding debt of $60,000.00. Exhs. P-221; P-275; N.T. 3/9/2004 at 155.

The $500,000.00 Advance

134. PTN claims that the $500,000.00 advance was a loan and, therefore, RBI must reimburse PTN $500,000.00 plus $75,000.00 in interest. Exh. P-221.

135. The TBA does not characterize the $500,000.00 advance as a loan. Exh. P-1.

136. The TBA specifically states that the initial $100,000.00 was a "non refundable deposit." Id.

137. Richard Glanton testified that he did not request a note to evidence a $500,000.00 loan. N.T. 3/10/2004 at 126.

Lost Profits

138. PTN claims that it is due an amount for compensation of lost profits. PTN's FFCL, p. 59; Exh. P-252.

139. PTN claims that they have lost profits through December, 2003 in the amount of $3,271,449.00. Exh. P-252, N.T. 3/12/2004 at 48-49.

140. PTN further claims that, if the court awards lost profits in lieu of reinstatement of the TBA, PTN is entitled to an additional $3,046,312.00, covering lost profits up to November, 2006 (the end date of the TBA). Exh. P-275.

141. John Del Roccili, RBI's expert, testified that he agreed with PTN's estimate of revenues. N.T. 3/15/2004 at 53.

142. However, Mr. Del Roccili opined that PTN did not subtract from revenues certain incremental expenses, totaling $2,733,093.00, that must be deducted. Exh. D-181.

143. Although Mr. Del Roccili knew that PTN, during the period of time the TBA was in effect, operated two television stations, Channel 7 and Channel 51, [24] Mr. Del Roccili testified that he did not analyze by category or specific item the costs and expenses incurred by PTN to operate Channel 7 separate and apart from Channel 51. N.T. 3/15/2004 at 50-51.

144. Mr. Del Roccili opined that PTN's revenues from operating Channel 7 in 2002 and 2003 were "mitigating revenues," which revenues he subtracted from RBI's total revenues to arrive at net revenues. N.T. 3/15/2004 at 22-23; Exh. D-181.

[24] N.T. 3/15/2004 at 47.

145. RBI also claims that certain commissions must be deducted from PTN's lost profits. Exh. D-181.

146. Mr. Del Roccili based his conclusions regarding commissions on figures supplied to him in summary form by Tom Root, a member of the RBI organization. Exh. P-278.

147. Mr. Del Roccili did not test, verify or substantiate the accuracy or completeness of the information. N.T. 3/15/2004 at 37-39.

148. Additionally, Mr. Del Roccili did not obtain financial statements from RBI's outside accountants related to commissions. Id. at 42.

Option Shares

149. Regarding the monetary value of PTN's option's shares, William Redpath determined what he believed was the "stick value"[25] of the Station based on a market approach using a comparable sales methodology. N.T. 3/11/2004 at 18, Exh. P-219, p. 57.

150. Mr. Redpath based his analysis of the Station's value on a construction permit for the WTVE Mt. Penn antenna site that would increase the antenna height and would increase the Station's ERP. N.T. 3/11/2004 at 20.

151. Mr. Redpath concluded that value of WTVE at the time of trial was $33,750,000.00. Exh. D-169.

152. Lawrence Patrick, an RBI expert, also based his appraisal of the Station using a "Market-based Comparable Sales Approach" methodology. Id.

[25] Mr. Redpath testified that "stick value" refers to the value of a television station without measurable market share, as the value of the station equals the value of its license and physical assets. N.T. 3/11/2004 at 22-23.

153. Mr. Patrick testified that there was an application for the construction permit relied on by Mr. Redpath in his valuation. However, the permit was never granted. N.T. 3/17/2004.

154. Mr. Patrick believed that the fair market value of WTVE, as of December, 2001 was $17,898,772.00. Exh. D-169.

155. By stipulation between the parties, the following are credits to which PTN is entitled and have not yet been paid: (1) $19,858.75, sales commissions paid to Frank McCracken in connection with programming sold for broadcasting on the hours reserved to RBI under the TBA, (2) $634.36, sales commissions paid to Branda Peiffer in connection with programming sold for broadcasting on the hours reserved to RBI under the TBA, (3) $11,110.50, inadvertent double-billing to RBI by Holland & Knight for legal fees and expenses, (4) $3,949.21, inadvertent double-billing to PTN of an electric company invoice for electricity being supplied to the transmitter, (5) $79.66, Barbara Williamson's telephone charges that were actually incurred before the TBA became effective, (6) $128.17, a charge inadvertently included in Frank McCracken's expense reimbursement for December, 2000, representing a personal charge for Thanksgiving dinner for his family and (7) $166.00, Tom Root's expenses mistakenly charged to PTN in May 2000.

DISCUSSION

PTN brought the following causes of action against RBI: breach of contract (Count I), fraud and deceit (Count II), intentional interference with contractual relations (Count III), and civil conspiracy (Count IV). This court entered a compulsory nonsuit on both Count III and Count IV.

RBI Breached the Time Brokerage Agreement

In Count I, PTN maintains that RBI breached the operative version of the Time Brokerage Agreement ("TBA")[26] and, as a result, breached the Option Agreement. In addition, PTN alleges that RBI breached the specific terms of the Option Agreement. "The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties." Lower Fredrick Township v. Clemmer, 518 Pa. 313, 329, 543 A.2d 502, 512. Moreover, "the goal is to determine the intent of the parties, and in the absence of ambiguity, the plain meaning of the agreement will be enforced." Gene and Harvey Builders v. Pa. Manufacturers' Ass'n., 512 Pa. 420, 426, 517 A.2d 910, 913 (1986).

A cause of action for breach of contract requires: 1) the existence of a contract, 2) a breach of the duty imposed by the contract, and 3) resultant damages. Corestates Bank N.A. v. Cutillo, 1999 Pa. Super. 14, 17, 723 A.2d 1053, 1058 (1999).

PTN alleges that RBI breached the TBA by: 1) not providing evidence that the $500,000.00 advance was spent according to Schedule 3.1 of the TBA and that the money was not used for the purposes set out in Schedule 3.1, 2) transmitting at less than 50 percent of the station's ERP and not providing PTN a *pro rata* credit for the period of time RBI broadcasted at less than 50 percent of its licensed ERP in violation of Section 7B of the TBA, 3) billing PTN for expenses not due under the TBA, and 4) withholding revenues due PTN under Section 1 of the TBA. Exh. P-230. PTN also alleges that the

[26] The parties entered into the first Time Brokerage Agreement ("TBA") on October 13, 1999. Exh. D-6. The parties then entered into a second TBA on November 1, 1999. Exh. D-7. The operative version of the TBA was entered into on November 16, 1999. Exh. P-1.

TBA and the Option Agreement are one single transaction and a breach of one agreement causes a breach of the other. Id.

A. The $500,000.00 Advance Was Not Accounted for by RBI in Violation of the TBA.

PTN claims that RBI breached the TBA, in part, by not accounting for the $500,000.00 paid to RBI at the earliest stage of the parties' relationship. The court finds that RBI breached the TBA by not providing PTN with evidence of how the money was spent.

According to Schedule 3.1 of the TBA, PTN was to advance $500,000.00 to RBI, beginning with a $100,000.00 "non-refundable" deposit, to pay outstanding obligations. PTN did in fact pay RBI $500,000.00. Exh. P-109; N.T. 3/19/04 at 8. Schedule 3.1 instructs RBI to provide PTN with "satisfactory evidence" of how the advance was spent, and specifically provides:

> Within 5 business days after the Commencement Date [PTN] shall make advances to [RBI] for the purposes of paying documented outstanding, past due balances on debt service for the Massey obligation and other accounts payable not to exceed $400,000.00 in the aggregate. All of the foregoing amounts paid by [PTN] to [RBI] shall be used by the [RBI] solely, exclusively and promptly to pay outstanding debt service obligations, legal fees and accounts payable and expenses, and *[RBI] shall provide [PTN] with satisfactory evidence thereof.*

Exh. P-1 (emphasis added).

Despite the unambiguous language of Schedule 3.1, Frank McCracken, the president and general manager of RBI, [27] testified that RBI did not provide PTN with an accounting of the $500,000.00 up to the time RBI terminated the TBA.[28] Indeed, it was

[27] N.T. 2/4/2004 at 53.
[28] Id. at 38.

not until the discovery phase of this litigation that the money was accounted for.[29] Based on RBI's blatant disregard of their obligations under the TBA, this court finds that RBI violated Schedule 3.1 of the TBA.

B. RBI Used the Advance to Pay It's Own Employees in Violation of the TBA.

Schedule 3.1 of the TBA provides that the $500,000.00 advance "shall be used by [RBI] solely, exclusively and promptly to pay outstanding debt service obligations, legal fees and accounts payable and expenses . . . ." What constitutes "outstanding . . . expenses" was a matter of contention at trial. It is PTN's position that the advance was to pay "outstanding . . . accounts payable and expenses" of individuals not employed by RBI.

At trial, evidence was presented that RBI used a portion of the $500,000.00 for Christmas bonuses to certain of their employees.[30] Tom Root, special assistant to Michael Parker, was paid $20,000.00.[31] PTN argued that the $500,000.00 should not have been paid to these "insiders" and these payments violated Schedule 3.1.

The intent of the parties to a written contract is to be regarded as being embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement. Estate of Breyer, 475 Pa. 108, 379 A.2d 1305 (1977); Felte v. White, 451 Pa. 137, 302 A.2d 347 (1973); East Crossroads Ctr., Inc. v. Mellon-Stuart Co., 416 Pa. 229, 205 A.2d 865 (1965); Siciliano v. Misler, 399 Pa. 406, 160 A.2d 422 (1960); Kennedy v. Erkman, 389 Pa. 651, 133 A.2d

[29] There was argument at trial surrounding a $27,000.00 difference between the document RBI finally presented to PTN and the $500,000.00 advance. PTN argued that the $27,000.00 was not accounted for and RBI countered by alleging that the $27,000.00 went to payroll. PTN's FFCL at 21; N.T. 3/19/2004 at 68-69.
[30] N.T. 3/19/2004 at 67.
[31] Id. at 10.

550 (1957); Atlantic Ref. Co. v. Wyoming Natl. Bank of Wilkes-Barre, 356 Pa. 226, 51 A.2d 719 (1947).

However, where the contract language is ambiguous, "[p]arol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances." Yocca v. Pittsburgh Steelers Sports Inc., 578 Pa. 479, 498, 854 A.2d 425, 436-37 (2004), *citing* Estate of Herr, 400 Pa. 90, 94, 161 A.2d 32, 34 (Pa. 1960), *see also* Waldman v. Shoemaker, 367 Pa. 587, 591, 80 A.2d 776, 778 (Pa. 1951).

The court finds that the language of Schedule 3.1 is ambiguous with regard to whether RBI, under the TBA, could use a portion of the $500,000.00 to pay employees of RBI. This ambiguity allows for the consideration of extrinsic evidence.

In a November 2, 1999 Frank McCracken of RBI wrote to Richard Glanton of PTN clearly stating his position as follows:

> The only use which the sums being advanced by PTN shall be put other than payment of accounts payable will be to make such deposits and other advance payments reasonably required to cause repair of the WTVE transmitter so that the station can again operate with full power. Such operation is required by the Time Brokerage Agreement. RBI shall not cause the payment of dividends to shareholders *or any other compensation to insiders* with the proceeds of the payment being made today, nor shall RBI make any advances or loans to corporate insiders with the proceeds thereof.

Exh. P-25.

Based on the language of Schedule 3.1, coupled with the February 2, 1999 correspondence, it is unmistakable that the parties intended that the $500,000.00 **not** be paid to individuals who were employed by RBI. Christmas bonuses were paid to RBI employees and a $20,000.00 payment was made to Tom Root out of the proceeds of the

$500,000.00. The court finds that these payments were made in violation of Schedule 3.1,[32] and constituted a breach of the TBA.

C. RBI Breached the TBA by Withholding the *Pro Rata* Credit Due PTN as the Result of RBI Broadcasting at Less Than 50 Percent Power.

The first step in determining whether RBI breached the TBA by not providing PTN a *pro rata* credit for periods of time when the Station was transmitting below 50 percent ERP, is to decide whether RBI did in fact transmit below 50 percent ERP. PTN claims that the Station transmitted substantially below 50 percent for a majority of the time that PTN's broadcasting was on the air. Exh. P-220. RBI denied that it transmitted below 50 percent ERP with the exception of a short period of time directly after the fire. N.T. 3/16/2004 at 167-68; N.T. 3/9/2004 at 50; N.T. 2/3/2004 at 23-24, 27. As the December, 2000 fire destroyed certain gauges that would have measured WTVE's ERP,[33] the question of WTVE's ERP during the relevant periods of time was, by necessity, addressed by the parties' experts. Before a discussion of the experts' findings, a brief recitation of the transmitter's power issues is called for.

At the time that PTN and RBI entered into the TBA in late 1999, one of the large focusing magnets in the transmitter was inoperative. As a result, the transmitter was operating in emergency multiplex mode. N.T. 3/12/2004 at 141; N.T. 3/16/2004 at 7-9, 64-65; N.T. 3/17/2004 at 9-17. This power issue, in part, prompted Mr. Parker to write to

[32] There was a dispute at trial regarding whether the $500,000.00 advance was a loan or an up-front "price of admission." This issue is discussed *infra* at pages 62-64.
[33] N.T. 3/18/2004 at 72, 77, 132.

Richard Glanton on December 1, 1999.[34] According to Mr. Parker, this correspondence was to serve as a supplemental agreement.[35] Mr. Parker wrote, in pertinent part:

> [n]otwithstanding any other provision of the *TBA*, [RBI] may continue to operate the Station's transmitter at less that [sic] full power while it repairs the equipment failure which existed as of the dates the parties negotiated and executed the *TBA* and continues to exist as of the date of this letter. [RBI] has received the $400,000.00 payment from PTN and has caused the ordering of repair items, and will proceed to effect repairs promptly."

Exh. P-23 (emphasis in the original).

On January 31, 2000, an Amendment to the Time Brokerage Agreement was entered into by the parties. Exh. D-2. This Amendment references "the electromechanical breakdown of a magnetic part of the transmitter." Id. at ¶ 2. It states that RBI had removed the broken components and "arranged for the components to be repaired if possible or replaced if repair is infeasible." Id. In the Amendment, PTN waived its right to deem RBI to be in default "because of its failure to operate at the maximum transmitter power authorized by the FCC. . . ." Id. RBI acknowledged in the Amendment its obligation to "repair the transmitter promptly" and that PTN agreed to pay for the repairs. Id. The broken magnet was repaired on March 23, 2000. The parties stipulated that the transmitter operated in emergency multiplex mode from January 1, 2000 through March 23, 2000. Exh. P-266, ¶ 14. It is important to note that in the formal Amendment, PTN waived only its right to *default* RBI due to of the fact that the Station was not transmitting at full power. PTN did **not** waive its rights to a *pro rata*

[34] The December 1, 1999 correspondence also addressed RBI's continuing to provide master control operations, as PTN was unable to assume control of master control operations. Exh. P-23.

[35] The December 1, 1999 correspondence contained language relating back to the second version of the TBA, not the operative version of the TBA dated November 16, 1999: "Thus, we previously agreed that the following additional or supplemental terms would govern the relationship between Reading Broadcasting, Inc. ("Licensee") and Philadelphia Television Network, Inc. ("Broker") under the *Time Brokerage Agreement* executed between the parties on or about Monday, November 1, 1999 ("TBA").

credit in the event that the Station was not transmitting at below 50 percent of its licensed ERP.

When the transmitter is operated in emergency multiplex mode, using only one Klystron tube instead of the normal three, the transmitter – and therefore the Station – cannot operate at its maximum licensed ERP. RBI's FFCL at ¶ 75. Just how much power is generated by the transmitter when it is operated in emergency multiplex mode was a matter of substantial dispute between the parties at trial. However, there was no dispute that the Station, when operating in emergency multiplex mode, was necessarily operating at less than full power.

Moreover, according to the parties' stipulation, the Station operated in single-tube emergency multiplex mode from January 1, 2000 through March 23, 2000, and from March 23, 2000 through May 6, 2000. The Station was off the air from May 8, 2000 at 19:28 until the morning of May 11, 2000. The Station operated in single-tube emergency multiplex mode from May 11, 2000 through August 4, 2000, from August 7, 2000 at 11:00 until the morning of August 25, 2000, and from August 25, 2000 at 23:10 until October 2, 2000 at 08:00. On December 23, 2000, the Station suffered the loss of its transmitter due to a fire, causing the Station to be off the air until December 29, 2000. From the time that the Station resumed broadcasting after the fire until the termination of the TBA, the Station operated in single-tube emergency multiplex mode. Exh. P-266.[36]

[36] Conversely, the parties also stipulated that the Station operated in normal three-tube mode from March 23, 2000 at 18:06 through May 6, 2000 at 06:00, from August 4, 2000 at 17:00 through August 7, 2000 at 04:00, from August 25, 2000 at 16:00 through August 25, 2000 at 22:10, and from October 3, 2000 at 12:00 through December 23, 2000 at 12:00. Exh. P-266.

In addition to the Station operating in one-tube emergency multiplex mode, from December 29, 2000 until August 2, 2001, the transmitter operated utilizing a "soft" tube. Exh. P-45. According to Dave Kase, RBI's Assistant Chief Engineer from 1997 through August, 2001, a "soft" tube is an "older tube," a tube that is "wearing out." N.T. 3/18/2004 at 16. As was the case concerning how much power can be transmitted in single-tube emergency multiplex mode, the issue of how much power can be transmitted when a "soft" tube is utilized was a matter of disagreement among the parties.

According to Section 7. B. of the TBA,

> [i]f the Station suffers any loss or damage of any nature to its transmission or studio facilities, which results in the interruption of service or the inability of the Station to operate with its maximum authorized facilities, [RBI] shall immediately notify [PTN] and [RBI] shall undertake such repairs as are necessary to restore full-time operation of the Station with its maximum authorized facilities as expeditiously as possible following the occurrence of any such loss or damage…. *In the event that such loss or damage causes the Station to operate for a period in excess of 36 hours at less than 50% of its licensed effective radiated power, then [PTN] shall be entitled to a pro rata reduction in its monthly payment for the full duration of such service interruption. . . .*

Exh. P-1 (emphasis added).

There is no question that the Station, from the inception of the parties' relationship until RBI took PTN off the air, transmitted at less than full power for the majority of time. The question is whether, during this time, RBI was transmitting at less than 50 percent of its licensed ERP. Under Section 7.B. of the TBA, if RBI was transmitting at less than 50 percent and PTN was not receiving its *pro rata* reduction of its monthly payment, RBI breached the TBA and owes PTN a *pro rata* reduction in its monthly expenses.

PTN's expert Sidney Shumate, an engineer, concluded that WTVE transmitted at significantly less than 50 percent ERP based upon an indirect method of analysis,

buttressed by an analysis of ERP based upon the Station power bills.[37] Exh. P-220. RBI's expert, Gibson White, the Station's chief engineer, opined that with the exception of approximately one week for which PTN was given a *pro rata* credit,[38] the Station operated at or exceeded 50 percent ERP. N.T. 3/18/2004 at 87-88, 97-98.

This court accepts Mr. Shumate's analysis as credible for the following reasons: (1) Mr. Shumate relied not only on an indirect method of calculation, but he also did an analysis based on the power going into the station as evidenced by the Station's power bills and the amount of power used by the various electronic equipment utilized by the Station, (2) other evidence in correspondence sent by RBI to the FCC and to WTVE's insurer supports Mr. Shumate's conclusions,[39] and (3) an internal memorandum, written by Mr. White, evidenced his doubts that the Station was operating at 50 percent ERP:

> There is concern on my part that we may not be running at the full 50% power output as we have implied with all the figures and such. There are many variations in all high power klystron tubes and the gain factor of each can vary widely. I believe we are close to the 100% output of the tube however until I can measure it directly with my calibrated wattmeter and load (which are at the transmitter site right now) I cannot say for sure what the exact gain of the tube and the true output might be. The tube TV51 is currently working was to be a loaner tube, as it was known to have lower gain than normal. And it will not allow the beam voltage to go much higher than it is now before it "trips" the protection circuits. High voltage is essential for high power output of the klystron.

Exh. P-45.

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[37] For a complete discussion of Mr. Shumate's calculation, see his report at Exh. P-220.
[38] Exhs. P-86; P-91.
[39] In a January 3, 2001 application to the FCC for a temporary authority to operate for an extended period of time in emergency multiplex mode, RBI stated that "WTVE is operating at 30,000 watts TPO visual (about 565,000 ERP), but it may not be possible to maintain that power level during this interim period." Exh. P-85. On January 23, 2001, Gibson White contacted WTVE's insurance company via e-mail stating: "[a]ll the tubes in the transmitter have been checked and none of them work. The tube in place now was a 'spare' tube that has not been able to achieve full power for years. It was around just for this case, an emergency 'spare.'" Exh. P-88.

Conversely, this court finds that Mr. White was not a credible witness due to his making material changes on an errata sheet following his deposition, which changes all pertained to the issue of the Station broadcasting at less than 50 percent ERP. N.T. 3/18/2004 at 141-43, N.T. 3/19/2004 at 183-85; Exh. P-236. Additionally, Mr. White waffled on an important calculation that, if one were to rely on his deposition testimony, would have the Station broadcasting at less than 50 percent ERP. N.T. 3/18/2004 at 124, 153-57. Moreover, the court finds that Mr. White was biased in that he is not only currently employed by WTVE,[40] but has also done work on Mr. Parker's other projects.[41] Finally, Mr. White, in his analysis, did not take into account the fact that during the relevant period, the sole tube that the Station was using to transmit its programming was "soft," and by all accounts a soft tube is not capable of full power. N.T. 3/22/2004 at 71; N.T. 3/19/2004 at 156-57; N.T. 3/18/2004 at 16.

Therefore, the court adopts Mr. Shumate's results and finds that RBI materially breached the TBA by not providing PTN its *pro rata* credit for the period of time the station was broadcasting at less than 50 percent ERP.

D. The Time Brokerage Agreement and the Option Agreement Must be Read as a Single Transaction.

PTN urges that the TBA and the Option Agreement are so intertwined that a breach of one by RBI necessarily constitutes a breach of the other. Furthermore, PTN argues that, separate and apart from the issue of whether the two documents are interrelated, RBI breached the Option Agreement. Consequently, PTN asserts that the breach of the Option Agreement by RBI excused PTN from making the second

[40] N.T. 3/18/2004 at 44.
[41] Id. at 135.

anniversary payment when it became due and entitles PTN to exercise its rights under the Option Agreement.

In opposition, RBI counters that due to PTN's failure to make the second anniversary payment, PTN breached the Option Agreement and gave up its entitlement to exercise it rights when the FCC's proceeding finally concluded.

Consideration of the TBA and Option agreement leads to the conclusion that the parties intended the TBA and Option Agreement to be inextricably intertwined, and therefore, a single transaction. Even if one were to find that the language of the agreements are ambiguous with regard to their being interrelated, there was ample evidence presented to substantiate a finding that the parties believed that a breach of the TBA constituted a breach of the Option Agreement. Thus, the agreements should be construed with reference to the other. RBI's breach of the TBA constituted a breach of the Option Agreement.

As was stated above, "[T]he fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties." Lower Frederick Township v. Clemmer, 518 Pa. at 313, 329, 543 A.2d at 502, 512 1988. In order to determine the meaning of the agreement, the court must examine the entire contract "since it is well settled that in construing a contract the intention of the parties governs and that intention must be ascertained from the entire instrument taking into consideration the surrounding circumstances, the situation of the parties when the contract was made and the objects they apparently had in view and the nature of the subject matter." In re Mather's Estate, 410 Pa. 361, 366, 189 A.2d 586, 589 (1963); *citing* Betterman v. American Stores Co., 367 Pa. 193, 80 A.2d 66 (1951), Waldman v. Shoemaker, 367 Pa. 587, 80 A.2d 776

(1951), Scholler Trust, 403 Pa. 97, 169 A.2d 554 (1961), Wolters Estate, 359 Pa. 520, 59 A.2d 147 (1948). *Cf. also* Walton Estate, 409 Pa. 225, 231, 186 A.2d 32 (1962), Althouse Estate, 404 Pa. 412, 416, 172 A.2d 146 (1961).

As to whether two contracts should be read as one, "[w]here several instruments are made as part of one transaction they will be read together, each will be construed with reference to the other, and this is so although the instruments may have been executed at different times and do not in terms refer to each other." Neville v. Scott, 182 Pa. Super. 448, 452, 127 A.2d 755, 757 (1957). Likewise, the court in Von Lange v. Morrison-Knudson Co., Inc. held:

> it is a general rule of contract law that where two writings are executed at the same time and are intertwined by the same subject matter that they should be construed together and interpreted as a whole. There is not any 'requirement that a contract be evidenced by a single instrument' and 'if contracting parties choose, they may express their agreement in one or more writings and, in such circumstances, the several documents are to be interpreted together, each one contributing (to the extent of its worth) to the ascertainment of the true intent of the parties.'

460 F.Supp. 643, 647-648, 1978 U.S. Dist. LEXIS 14343, **12-13 (M.D. Pa. 1978) *citing* International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 417-18, 110 A.2d 186, 191 (1955) (citation omitted).

Guided by In re Mather's Estate, *supra*, the court will first examine the circumstances surrounding the agreements.

It is undisputed that by mid to late 1999, RBI had already incurred substantial legal fees in connection with the FCC license renewal proceedings and was about to incur substantial additional legal fees and costs relative to evidentiary hearings before the ALJ. Because of RBI's distressed financial condition, it owed Holland & Knight (their FCC counsel) several hundred thousand dollars in past legal fees. Holland & Knight was threatening to withdraw from further representation of RBI unless an effort was made to reduce the outstanding debt. N.T. 3/12/2004 at 132-33, 157; N.T. 3/16/2004 at 41-42; N.T. 3/17/2004 at 145-47.

Finding a way to pay the legal fees to continue the FCC license renewal proceedings was critically important to RBI's survival, because the FCC license, which was under attack, was RBI's most valuable and significant asset. N.T. 3/12/2004 at 156-57; N.T. 3/16/2004 at 157-58.

In lieu of purchasing the station outright, PTN expressed an interest in acquiring an option to purchase less than 50 percent of RBI's stock because an option to acquire less than 50 percent of RBI's stock would not violate the FCC's prohibition against a change in control of the station while the license renewal was pending.[42] N.T. 3/12/2004 at 122-24, N.T. 3/10/2004 at 19-20, 90.

RBI was well aware from the outset that PTN wanted to purchase the Station and was not interested in entering into a relationship with RBI unless, as part of the transaction, PTN acquired both a right of first refusal and an option to acquire a substantial ownership interest.[43]

[42]Under FCC rules, it would have been impermissible, in light of the pending License Renewal Challenge, for PTN to acquire a majority interest in WTVE.

[43] In fact, Section 26 of the TBA provides that PTN had "first refusal to purchase the Station and all of its assets or stock . . ." Exh. P-1.

Brian Johnson, PTN's counsel who drafted the documents and participated in the negotiations, testified:

> Q. Would you describe for the Court what PTN's goals and objectives were in entering into the transaction?
>
> A. Yes, PTN really had two primary goals initially. The first was to either buy station WTVE or Reading Broadcasting, and secondarily, through that process, would be able to have the programming of their lower power station, Channel 7, in Philadelphia, rebroadcast from Channel 51 and therefore obtain a wider service area and cable must-carry rights.

N.T. 3/10/2004 at 19.

Michael Parker testified that PTN would not have entered into the relationship with RBI without both the TBA and the Option Agreement.

> Q. Certainly, you understood during the entire process that there wasn't gonna be a time brokerage agreement unless there was an agreeable option agreement that went along with it. They were together in that sense.
>
> A. Again, in the sense that unless they had 33 and a third percent of the shares optioned, there wouldn't be a TBA, yes.

N.T. 3/16/2004 at 151.

Moreover, both parties testified that they believed that the Time Brokerage Agreement and the Option Agreement represented a single transaction. Frank McCracken, an officer of RBI and the individual responsible for WTVE's day-to-day operations, [44] testified as follows:

> Q. Let me direct your attention to [the Option Agreement]. You identify that as the option agreement entered into as the plaintiff and certain stockholders of RBI as well as RBI being a party to that agreement?
>
> A. Yes sir.

[44] In addition, upon Michael Parker's resignation on May 18, 2001, Mr. McCracken became RBI's highest ranking officer. At the time of trial, Mr. McCracken was the President and general manager of RBI. N.T. 2/2/2004 at 53; N.T. 3/22/2004 at 15.

Q. Now, you understood, did you not, that PTN was intending to acquire a substantial portion of the stock of RBI as part of this transaction which led to the parties entering into this relationship, you understood that, sir?

A. I believe so.

Q. You understood that PTN wasn't interested in just providing some programming and getting the revenues, its plan was to acquire a big chunk of the station?

A. Yes sir.

Q. You understood that the reason the transaction was structured the way it was because in light of the license renewal challenge, a big block of stock could not be sold at that time, do you understand that?

A. Yes.

Q. As far as you were concerned, and the position that you took when you were acting as the president were that the two agreements were linked together and breach of one was a breach of the other?

. . . .

A. I believe so.

. . . .

Q. That's what you believed, right?

A. That's what I believe.

N.T. 2/2/2004 at 97- 98.

Although at trial Mr. Parker could not "answer definitively" the question of whether a breach of the TBA was also a breach of the Option Agreement, [45] he was reminded of his deposition testimony on the issue wherein he clearly believed that a breach of one contract was a breach of the other.

Q. And you described this $500,000.00 as the fee for coming to the table.

A. Well, in other words, RBI got half a million dollars. Richard Glanton got a Time Brokerage Agreement and he got options on

[45] N.T. 3/16/2004 at 152.

> 33 percent of the stock which he paid for, but clearly the two documents are interlinked. The default on the one is a default on both which is at my insistence.

N.T. 3/16/2004 at 152-53.

Not only did the parties testify that the agreements were intertwined, several of the default notices sent to PTN from RBI included language linking the contracts together. Contained in the December 6, 2000, the January 18, 2001, the April 5, 2001 and the June 1, 2001 default notices is the following warning: "breach of the *Time Brokerage Agreement* causes a cross default on PTN's *Stock Option and Purchase Agreement.*" Exhs. P-153-156; P-159 (emphasis added in original).

Finally, a clause of the TBA references the Option Agreement:

> WHEREAS, Licensee [RBI], certain of Licensee's stockholders and Broker [PTN] have entered into an Option and Stock Purchase Agreement (the "Option Agreement") granting to Broker [PTN] an option to purchase thirty-three and one-third (33 1/3%) of the issued and outstanding capital stock of Licensee (and capitalized terms herein which are not otherwise defined herein shall have the same meanings as stated in the Option Agreement).

Exh. P-1.

Likewise, the following portions of the Option Agreement reference the TBA:

> a) WHEREAS, As of the date of this Agreement the Buyer and the Company have entered into a time brokerage agreement regarding Station (the "Time Brokerage Agreement"), and as a condition and in consideration of the effectiveness of the Time Brokerage Agreement the Buyer and Sellers have agreed to enter into this Agreement….
>
> . . . .
>
> c) 10.1 Termination. This Agreement may, by written notice given prior to the Closing, be terminated at any time:
>
> (a) by mutual written consent of Sellers and Buyer,
>
> . . . .

(b) by Buyer or Sellers as provided in the Time Brokerage Agreement.

Exh. P-3.

This court finds that the TBA and the Option Agreement represented one single transaction. The court holds that a breach of one constituted a breach of the other. Thus, PTN's claim that, separate and apart from the issue of the relationship of the two documents, RBI breached the Option Agreement, is moot.[46]

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[46] Plaintiff PTN argued that under Sections 5.3 and 5.5 of the Option Agreement, RBI and the Selling Shareholders were required to provide PTN (i) with RBI's monthly and quarterly financial statements and reports within thirty days of the close of the month, (ii) with "such other monthly and other periodic reports and statements for the Station as are prepared in the usual and ordinary course of business," (iii) all reports and applications filed with the FCC with respect to the Station, and (iv) all material information concerning the business of the Station. Exh. P-3. RBI conceded that, after it terminated the TBA, it failed to provide financial information or any other information to PTN concerning the Station. N.T. 2/4/2004 at 61-62. Additionally, PTN argues that Sections 3.10(b) and 3.15(d) of the Option Agreement were breached because, under those sections, RBI and the Selling Shareholders represented and warranted that RBI had performed each material term, covenant and condition of each of its "Contracts." PTN claims that the term "Contracts" included the TBA. PTN argued that RBI breached these sections in failing to perform each material term, covenant and condition of the TBA, by wrongfully defaulting the TBA and by terminating the TBA outside of the ordinary course of business. This court will not make a determination as to which agreements or contracts were meant to be included in the term "Contracts" under these sections because this court finds that a breach of the TBA constituted a breach of the Option Agreement.

PTN further argues that Section 3.20 of the Option Agreement, requiring RBI and the Selling Shareholders to operate the Station in compliance with the FCC requirements, was breached. These breaches included:

a. Operating in 1999 and 2000 (prior to the fire) below the 80 percent ERP threshold required by FCC regulation §73.1560(c) and by failing to seek "specific authority from the FCC" to operate at such reduced power levels as required by FCC regulation §73.1560(d).

b. Failing to maintain and retain its transmitter maintenance logs for at least two years or complaints against RBI regarding the Station's power,

c. Using meters which have broken or appear to be damaged or defective or whose accuracy is questionable in violation of FCC regulation §73.1840 (a)

d. Failing to inspect, calibrate and repair the transmitter metering system as necessary in violation of FCC regulation §73.1870(c)(1).

PTN's FFCL at p. 52.

However, in that a breach of the TBA constituted a breach of the Option Agreement, there is no need to reach the merits of these arguments. See also Findings of Fact nos. 23, 42, 45, 53.

Having found that RBI breached both the Time Brokerage Agreement and the Option Agreement, this court finds that the "prevention doctrine" controls PTN's recoverable damages.

Under Pennsylvania law, "[p]erformance of a contract or offer to perform it is excused and rendered unnecessary when it is prevented by the acts of the other party or is rendered impossible by him." Weinglass v. Gibson, 14 Pa. D.&C. 445, 447 (Phila. Ct. Com. Pl.1930), aff'd, 304 Pa. 203, 155 A. 439 (1931). Similarly, "[c]onduct of one party that prevents the other from performing is an excuse for nonperformance." Liddle v. Scholze, 2001 Pa. Super. 67, *11, 768 A.2d 1183, 1185 (2001). Likewise, "[a] party may not insist upon performance of the contract when he himself is guilty of a material breach of contract." Ott v. Buehler Lumber Co., 373 Pa. Super. 515, 518, 541 A.2d 1143, 1145 (1988), *citing* 17 Am. Jur. 2d Contracts § 365 (2004). A party "may not, in fact, take advantage of an insurmountable obstacle placed, by himself, in the part of the other party's adherence to an agreement. By preventing performance he also excuses it." Craig Coal Mining Co. v. Romani, 355 Pa.Super. 296, 301, 513 A.2d 437, 440 (1986). Accordingly, "a party may not complain of a breach caused by his own default." Kolbe v. Aegis Ins. Co., 370 Pa. Super. 539, 543, 537 A.2d 7, 8 (1987), *appeal denied*, 549 A.2d 136 (Pa. 1988).

The court finds that RBI cannot benefit from their breach of the TBA. RBI, having breached the TBA and as a consequence, the Option Agreement, excused PTN's second anniversary payment. Accordingly, PTN may exercise its rights under the Option

Agreement.[47]

E. PTN's Claim for RBI's Alleged Improper Withholding of Revenues Fails Because RBI Only Withheld Revenues for Hours Reserved for RBI's Own Programming.

PTN claims that RBI improperly withheld revenues that were due PTN. PTN's claim rests solely on one section of the TBA and ignores other sections that directly relate to RBI's right to retain revenues for programming reserved to RBI.

Under the terms of the TBA, RBI reserved four hours per week for the broadcast of programming that RBI would supply. Exh. P-1, Schedule 1.1. Pursuant to the Amendment to the TBA, the broadcast time reserved for RBI increased to six hours. Exh. P- 2, at ¶ 1; Amended Schedule 1.1. RBI sold to other programmers the right to broadcast programming during the hours reserved to RBI, and RBI retained those revenues. N.T. 3/16/2004 at 42-44. PTN claimed at trial that those revenues belonged to PTN. N.T. 3/9/2004 at 122-32; N.T. 3/12/2004 at 34-35.

In support of its position, PTN cites to Section 6 of the TBA: "[PTN] shall have the exclusive right to sell, either directly or indirectly through sales representatives, and shall be solely responsible for billing and collecting payments for, all programming and commercials aired on the Station . . . on and after the Commencement Date until the termination of this Agreement." Exh. P-1.

[47] RBI, in its Proposed Conclusions of Law, suggests that PTN is not entitled to equitable relief due to "PTN's breaches and anticipatory breaches." RBI's FFCL at ¶ 5. RBI's allegations rest on PTN's late payments and their threatening to withhold payments. As RBI's defense at trial was that they properly terminated the Option Agreement due to programming violations and not late payments, the issue of PTN's late payments was waived.

This argument ignores Section 1 of the TBA, titled Overall Purpose and Term. Exh. P-1. Section 1 states:

> In accordance with the terms and limitations set forth herein: (a) [PTN] shall program the Station as set forth in Schedule 1.1 attached hereto, promote the Station and its programming, sell commercial and other time on the Station and bill for and collect the payments for *time sales on the Station by [PTN]* . . . .

Exh. P-1 (emphasis added).

Moreover, Section 4 of the TBA states that "[p]rogramming currently under contract to [RBI] (or any of its Affiliates) for the Station will remain so . . ." and that "[RBI] may also contract for programming to be broadcast by it on the Station after the Commencement Date . . . ." Id. Section 4 of the TBA states that

> [d]uring the term of this Agreement, [RBI] shall be responsible for honoring and performing all commercial time sales agreements for the Station, including barter programs, during the time on Station (sic) reserved for [RBI's] use (a) in existence as of the Commencement Date and (b) entered into in the ordinary course of business, consistent with prior practices, after the Commencement Date by [RBI].

Id.

Taking the TBA as a whole, this court finds that RBI was given the right to retain revenues generated from its time sales on the Station for the hours reserved for RBI. Furthermore, from a practical standpoint, it does not make sense that PTN should retain all of the revenues generated from programming on the Station when PTN was not required to reimburse RBI for all of RBI's operating expenses. Therefore, this court finds that RBI was entitled to collect and retain those revenues associated with the broadcast hours reserved to RBI under the TBA.

PTN's Claim of Fraud and Deceit Fails

PTN claims that RBI's alleged fraudulent misrepresentations, i.e., that they were broadcasting at 50 percent ERP, preventing PTN from exercising its option rights, and reaping the profits which would have resulted from the difference between the cost of the shares under the option and the value of the shares once the Station was sold. This tort claim must be denied.

RBI's alleged fraud against PTN is fraud in the performance of the contract. The fraud complained of was, for example, the Station insisting to PTN that they were broadcasting at 50 percent ERP or above when they were not and knew that they were not. PTN's fraud claim is barred by the gist of the action doctrine.

The Pennsylvania Superior Court has ruled that the gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims . . . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." Etoll v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14-15 (Pa. Super. Ct. 2002). Tort claims are barred "where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Id. at 19.

RBI's alleged fraudulent misrepresentations are grounded in its failure to perform the contracts. Therefore, RBI's fraud claim is a breach of contract claim recast as a tort. Accordingly, PTN's fraud claim fails as it is barred by the gist of the action doctrine.

The following are PTN's claimed damages: (1) revenues improperly retained by RBI, (2) expenses that were incorrectly paid by PTN, (3) PTN's *pro rata* credit due on account of WTVE's broadcasting below 50 percent ERP, (4) damages for failure to return equipment, (5) damages for liabilities to third parties, (6) damages related to the $500,000.00 advance, (7) lost profits, (8) reinstatement under the TBA, and (9) option damages.

1. PTN's Claim for Revenues Improperly Retained by RBI is Denied.

As discussed, this court finds that based on the TBA,[48] RBI's had the right to retain those revenues pertinent to the broadcast hours reserved to RBI. Thus, PTN's claim for $320,125.57 fails.

2. PTN's Claim for "Overcharges" Fails in Part.

PTN claims that they were improperly billed $642,763.28.[49] This amount is comprised of: (a) payroll overstatement ($247, 067.17) and the attendant health insurance charges ($29,098.22), (b) professional association dues ($1,171.00), (c) charge for a "non-reimbursable" car ($3,836.89), (d) Holland & Knight overpayment ($247,610.00), (e) Tom Root's "non-reimbursable" expenses ($32,288.76), (f) George Mattmiller's "non-reimbursable" expenses ($6,014.99), (g) Frank McCracken's expenses or Optima charges ($11,728.40), (h) Michael Parker's expenses ($7,610.38), (i) retainer or Telemundo litigation ($10,000.00), and (j) Michael Parker's legal expenses

[48] Exhs. P-1, § 4; P- 2, ¶ 1.
[49] This amount is inaccurate as certain expenses have been credited to PTN. Those expenses equal $24,863.72.00. This reduces PTN's figure for monies improperly billed to $617,899.56.

($21,473.75). Exh. P-249.[50]

A. PTN's Claim for Payroll "Overstatements" is Denied.

PTN claims that they must be reimbursed for salaries they paid to RBI master control operations staff. RBI alleges that the salaries at issue were reimbursable to RBI due to RBI's having to maintain master control operations. The court finds that RBI properly passed the costs of master control operations to PTN.

The TBA sets out that PTN was to employ master control personnel. Exh. P-1, § 5. However, at the time that PTN and RBI entered into the TBA in late 1999, PTN was not in a position to operate master control. PTN asked RBI to continue to supply master control operators and supervisors, and RBI agreed to do so. N.T. 3/12/2004 at 19-20; 137-38, N.T. 3/16/2004 at 58, N.T.

On December 1, 1999, Michael Parker, wrote to Richard Glanton, the chairman of PTN and a board member of the company,[51] acknowledging that RBI was, by necessity, maintaining the master control operations. Mr. Parker's intention was that this correspondence was to serve as a supplemental agreement. This "supplemental agreement" provided that:

(1) *Operation of the Station*: Effective 12:01 a.m. local time on Tuesday, November 16, 1999, [PTN] will assume programming obligations under the TBA. Notwithstanding any other provisions of the *TBA,* [RBI] shall continue to employ sufficient master control operators to operate commercial television station WTVE (the "Station") 24 hours daily. Additionally, [RBI's] engineer, Dave Kase, will continue to be employed on full-time basis (sic). The Station will continue to be operated from the Station's main studio in Reading . . . .

[50] William Redpath, PTN's expert on the issues of valuation of the station and damages related to improper charges, included in his list of improper charges items that have been acknowledged by RBI and credited to PTN. These charges include Holland & Knight double billing ($11,110.50), double billing of Michael Parker's expenses ($1,500.15), double billing of the Transmitter electric bill ($3,949.21), Barbara Williamson's phone bill ($79.86), "KDM Corporation – Package and Auto Insurance" ($8,224.00), and monies double billed to PTN for Tom Root's salary ($2,000.00). Exh. D-172. Accordingly, credits given to PTN for these charges are not included in PTN's damages.

[51] N.T. 3/10/2004 at 81.

(2) *Additional Reimbursement*: In addition to reimbursement of expenses agreed to in the TBA, [PTN] shall reimburse [RBI] for all expenses associated with employment of the personnel described in Paragraph 1 of this letter, on the same terms and conditions as reimbursement is made for other expenses under the *TBA. The expenses to be incurred in providing the MCO services and other services required by PTN shall be in the reasonable discretion of RBI. PTN shall give RBI prompt notice of any costs associated with the provision of this service which it may dispute.*

. . . .

(5) *Duration of Agreements*: The agreements of the parties relating to operation of the station, additional reimbursement and temporary programming, set out in Paragraphs 1 through 3 of this letter, shall expire at the close of business on November 30, 1999, unless extended by written agreement of the parties, after which time the terms of the TBA shall continue to govern.

Exh. P-23 (Emphasis added.)

The court acknowledges that the "supplemental agreement" was in letter form and signed only by Michael Parker. However, PTN paid the salaries of RBI's master control operation's staff without objection. The court finds that, based on the conduct of the parties, Michael Parker's December 1, 1999 correspondence represents an agreement implied from the parties' course of conduct.

A contract is a "manifestation of mutual assent on the part of two or more persons." Restatement (Second) of Contracts § 3. The verb "to manifest," as the word is used in the Restatement means "to show or demonstrate plainly." The American Heritage Dictionary of the English Language, 3rd Edition (1992). A contract may be either express or implied. Murphy v. Slota, 454 Pa. 391, 393, 311 A.2d 904, 907 (1973). *See also* Restatement (Second) of Contracts § 4: "A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct." "The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct,

sometimes including silence . . . or by . . . other circumstances, including course of dealing or usage of trade or course of performance." Restatement (Second) of Contracts § 4, cmt. a.

RBI's billing PTN for the master control operation's staff (this includes the salary of Tom Root), and PTN's paying these individual's salaries, showed a mutual assent on the part of the parties to be bound by the terms of the December 1, 1999 letter.

Because this court finds that the December 1, 1999 letter was an implied agreement evidenced by the conduct of the parties, PTN was obligated to give "RBI prompt notice of any costs associated with provision of this service which it may dispute" for so long as PTN was unable to operate master control operations. Exh. P-23. PTN paid the salaries of RBI's master control operations staff and Tom Root without dispute until July, 2001, one month before PTN was taken off the air. Exh. P-238. Thus, this court holds that PTN's claim for payroll overstatement and the attendant health insurance costs, in the amounts of $247,067.17 and $29,098.22 respectively, is denied.

B. PTN's Claim for Professional Association Dues is Granted.

PTN claims that they were improperly charged certain professional association dues. This court agrees.

A review of the TBA shows that PTN was not obligated to pay all of RBI's professional association dues. According to Schedule 3.2 of the TBA, reimbursable operating expenses include "annual dues for the Pennsylvania Association of Broadcasters." Exh. P-1. The dues at issue related to professional associations other than the Pennsylvania Association of Broadcasters. Exh. P-220. Consequently, the court holds that PTN's claim for RBI's professional association dues is granted. Accordingly,

PTN will be awarded ($1,171.00 plus $70.00 interest) $1,241.00 for this item of damages.

C. PTN's Claim for Charges for a "Non-Reimbursable" Car is Denied.

PTN alleges that it was charged for a "non-reimbursable" car in the amount of $3,836.89. RBI claims that the car was a necessary cost of RBI maintaining master control operations.

PTN's expert William Redpath states in his report that Schedule 3.2 of the TBA authorized reimbursement for only one car, but that this expense related to a second car. Exh. P-221. Thus, Mr. Redpath included this expense in his itemization of damages. However, this court finds that given the additional personnel that RBI was required to keep on its payroll, the expense of the second car was an additional expense that RBI determined was appropriate in its reasonable discretion under the December 1, 1999 supplemental agreement. Exh. P-23. Accordingly, PTN's claim for a credit for this item in the amount of $3,836.89 is denied.

D. PTN's Claim for Holland & Knight "Overpayments" is Granted.

PTN alleges that they overpaid RBI for Holland & Knight legal fees in the amount of $247,610.00. RBI argues that the parties entered into a supplemental agreement regarding PTN's payment of legal fees and that this supplemental agreement required PTN to pay $50,000.00 monthly regardless of the amount billed to RBI by Holland & Knight. In support of its argument, RBI cites a letter written by Michael Parker to Richard Glanton dated August 10, 2000, which provides:

> We agreed in our July 24 discussion that PTN would pay $50,000.00 monthly toward Holland & Knight fees, with the $50,000.00 being applied first to obligations incurred with Holland & Knight since November 15,

> 1999 . . . We further agreed that once PTN has paid down all fees incurred since November 15, 1999, it will continue to pay $50,000.00 monthly to resolve RBI's balance prior to November 15, 1999. Holland & Knight reported to RBI that the fees prior to November 15, 1999, totaled $130,000.00. Our internal accounting matches that, calculating that the fees prior to November 15, 1999 equal $130,641.28. We agreed that any payments made by PTN against RBI's fees prior to November 15 would constitute a loan to RBI, which will have to be repaid at the time an assignment of license of WTVE takes place.

Exh. D-48.

So, PTN was obligated to pay not only monies owed by RBI to Holland & Knight for services rendered after November 16, 1999, but also monies owed by RBI that predated the TBA. The parties also agreed that any payments made by PTN against RBI's fees prior to November 16 would "constitute a loan to RBI, which will have to be repaid at the time an assignment of the license of WTVE takes place." Exh. D-48.

Because PTN has a right to exercise its rights under the Option Agreement, any monies paid by PTN that exceed the amount owed to Holland & Knight for services rendered before November 16, 1999, are due to PTN.

Holland & Knight billed RBI $848,876.06 for service rendered under the TBA. Exh. P-114. PTN paid $929,114.32. Exh. P-117. The court holds that RBI owes PTN the difference between these two amounts; and which amount the court awards PTN is $80,238.36.

E. PTN's Claim for Tom Root's "Non-Reimbursable" Expenses is Denied.

PTN makes a claim that RBI improperly overbilled PTN in the amount of $32,288.76 for charges incurred by Tom Root, for which no reimbursement was due. PTN's FFCL at 56; Exhs. P-133; 221. Specifically, PTN claims that RBI improperly billed for trips to Seattle, since those trips "had nothing to do with PTN." Exh. P-221.

RBI presented evidence that Tom Root's trips to Seattle involved his reviewing documents regarding the Telemundo litigation that were in the possession of Michael Parker at his home near Seattle. N.T. 3/22/2004 at 50-51. There was no dispute that RBI's expenses related to the Telemundo litigation were to be reimbursed by PTN. Exh. P-1, Schedule 3.2. Therefore, Mr. Root's expenses related to his trips to Seattle are not recoverable by PTN.

PTN argues that Root's expense reimbursement for the purchase of computers ($1,000.00 for Mr. Root's computer and $2,000.00 for Mr. McCracken's computer) was improper. PTN did not present evidence that showed how these computers were used. Additionally, PTN did not produce evidence that they challenged the legitimacy of these charges before or after they were paid during the life of the TBA despite the supplemental agreement's express mechanism by which PTN was to dispute charges. Exh. P-23. Therefore, PTN's claim for reimbursement of these paid expenses fails.

The court acknowledges that PTN's expert on this issue, William Redpath, sets out in his report a total amount "improperly" billed to PTN representing Tom Root's expenses. Exh. P-221. However, Mr. Redpath did not specify in his report the specific dollar amount attributable to the trips to Seattle, a local telephone expense of Mr. Root's in Ohio, "numerous charges that were coded as Cable Enhancement Expenses that were not cable Cable Enhancement Expenses, and numerous expenses that were not coded to the proper (or any) expense category in Schedule 3.2 of the TBA." Id. The court finds that PTN did not sufficiently prove this item of damages. Accordingly, PTN's claim for $32,288.76 is denied.

F. PTN's Claim for George Mattmiller's "Non-Reimbursable" Expenses is Denied.

PTN claims it is due $6,014.99 for projects RBI's general manager, George Mattmiller, worked on for Michael Parker,[52] two two-week trips to Seattle, billed as "Telemundo" expenses, and expenses incurred in attending the National Association of Television Executives (NAPTE) and the National Association of Broadcasters (NAB) conferences. Exhs. P-129; P-130; P-221. As noted, the TBA is clear that PTN was obligated to pay for expenses related to the Telemundo litigation. Accordingly, monies reimbursed by PTN for the Seattle trips were proper.

With respect to PTN's claim related to Mr. Mattmiller's work on non-PTN projects, there was trial testimony that supports Mr. Mattmiller's working on other projects for Mr. Parker,[53] but there was no evidence submitted at trial that quantifies what amounts were paid by PTN that related to these other projects.

Regarding PTN's claims for monies reimbursed for expenses for attendance at the NAPTE convention and the NAB conference, the proof offered at trial related to exact dollar amounts for these improper charges was insufficient.[54] Thus, in the absence of sufficient proofs, PTN's claim for George Mattmiller's "non-reimbursable" expenses is denied.

[52] N.T. 3/22/2004 at 131.
[53] Id.
[54] Mr. Redpath, in his expert report, only sets out total amounts for the alleged improper charges of George Mattmiller, Frank McCracken and Michael Parker. Although PTN provided invoices and charge account documents that support charges related to trips to Seattle, meals and attendance at conferences, it is impossible to tease out exact amounts related to these items of damages.

G. PTN's Claim for Frank McCracken's Expenses or Optima Charges is Denied.

PTN urges that RBI improperly over billed PTN $11,728.40 for charges incurred by Mr. McCracken for which no reimbursement was due. William Redpath, summarized Mr. McCracken's alleged improper charges as follows:

> Mr. McCracken frequently charged restaurant expenses to PTN, which are not included as reimbursable expenses in Schedule 3.2 of the TBA, well in excess of the $100.00 per month of miscellaneous expenses allowable (under Number 30 of Schedule 3.2 of the TBA). The business purposes of the restaurant expenses were not documented. At least one of the charged meals clearly had no business purpose, as it was Mr. McCracken's Thanksgiving Day 2000 dinner. Additionally, Mr. McCracken billed PTN for expenses associated with RBI's personnel's attendance at an annual NATPE convention, NATPE membership and travel expenses for Michael Parker (for which no business purpose was stated). Also, Mr. McCracken billed PTN for expenses associated with the National Association of Broadcasters convention in Las Vegas in April 2001, which is not included as a reimbursable expense in Schedule 3.2 of the TBA.

Exh. P-221.

The court holds that monies reimbursed by PTN for the NATPE convention and the NAB convention should not have been paid by PTN under the TBA. However, the court lacks sufficient evidence to adduce an exact amount for these expenses. Likewise, the court holds that PTN did not meet its burden of proof with regard to the inappropriateness of the restaurant expenses.[55] Accordingly, the court holds that PTN's claim for alleged non-reimbursable charges is denied.

H. PTN's Claim for Michael Parker's "Non-Reimbursable" Expenses is Denied.

According to Mr. Redpath, RBI billed PTN after the FCC record was closed for $2,811.08 "for which no business purposes was documented." Exh. P-221. Similarly,

[55] However, the parties have stipulated that the McCracken Thanksgiving dinner expenses shall be repaid to PTN.

Mr. Redpath opined that RBI billed PTN for two Las Vegas trips, one in February 2001 and one in May 2001, and a trip to Pennsylvania for which no business purposes were stated. Id. PTN did not introduce sufficient evidence that these charges were not covered by the TBA. Therefore, PTN's claim for Michael Parker's alleged "non-reimbursable" charges is denied.

I. PTN's Claim for a $10,000.00 Retainer Related to RBI's Defense in the Telemundo Litigation Fails.

Mr. Redpath included in his itemization of "overcharges" a $10,000.00 retainer paid to the Schnader Harrison law firm for the Telemundo litigation. Exh. P-221. Mr. Redpath objected to this charge because it was a "retainer" and was presumably not a payment for the performance of legal services. Id.; N.T. 3/11/2004 at 76. However, according to the testimony of Frank McCracken, the $10,000.00 was applied to later bills, and therefore was used to pay for legal services provided by that firm. N.T. 3/22/2004 at 51-52. This evidence was unchallenged. Since the TBA required PTN to pay expenses related to the Telemundo litigation, the court holds that this charge was properly billed to PTN. PTN's claim for this item of damages is denied.

J. PTN's Claim for Michael Parker's Legal Expenses is Denied.

Mr. Redpath's last item of damages for alleged overcharges consists of a payment in the amount of $21,473.75 to the Verner Liipfert firm which had been retained by Michael Parker to represent him individually in the FCC re-licensure proceedings. N.T. 3/16/2004 at 99-101; Exhs. P-221; D-107. Mr. Redpath objected to this expense because the invoice reflected work performed by Mr. Parker's personal attorney. Exh. P-221. But, Mr. Redpath testified that he did not know that these legal services related to the FCC re-licensure proceedings. N.T. 3/11/2004 at 78.

When the Administrative Law Judge issued his Initial Decision in the FCC re-licensure proceedings, he determined that Mr. Parker made material misrepresentations and omissions in prior filings with the FCC. The ALJ found Mr. Parker to be "unqualified" to hold any position of control in connection with RBI's license, or to participate in any potential settlement between RBI and Adams (RBI's opponent in these proceedings). Exh. P-277, ¶¶ 253-254. The Administrative Law Judge held:

> In deciding this case, Parker is found to be "unqualified" to control RBI's license because of his unauthorized taking of control, his failures to report timely and accurately, and particularly because of his false answers to Question 4 denying "fraud", his causing the misrepresented Dallas amendment to be filed and his lacking candor in his hearing testimony. Mr. Parker also is found to be "disqualified" from benefiting from any settlement that might be achieved between RBI and Adams."

Id., p. 79.

As a result of the ALJ's findings, Michael Parker retained separate legal counsel to represent him individually in the FCC proceedings. N.T. 3/16/2004 at 99-100. RBI informed PTN of that fact, telling PTN that "with RBI's and Mr. Parker's interests flowing in concert, his counsel's input is quite likely to benefit our cause as well as Mr. Parker's." Exh. D-100.

The court finds services rendered to Mr. Parker by his FCC counsel served RBI's defense in the FCC challenge. Additionally, it is undisputed that the TBA called for PTN's funding RBI's defense. Thus, PTN's claim for Mr. Parker's legal fees in the amount of $21,473.75, fails.

3. PTN's Claim for *Pro Rata* Credit is Granted.

PTN contends that they are entitled to the *pro rata* credit set out in Section 7. B. of the TBA. This court finds that WTVE broadcasted at less than 50 percent Effective

Radiated Power and has adopted the findings of PTN's expert, Sidney Shumate. *See* Section "C" *supra*, at page 30. Accordingly, this court holds that RBI shall reimburse PTN in the amount of ($1,418,687.00 plus $85,121.00 interest) $1,503,808.00.

4. PTN's Claim for Damages Related to RBI's Failure to Return Equipment is Denied.

PTN had acquired television production equipment financed through Sony Finance Services. N.T. 3/12/2004 at 59. This equipment was located at RBI's studios in Reading. Certain equipment belonging to RBI was located at PTN's studios in Philadelphia. N.T. 3/22/2004 at 36, 61. After the TBA was terminated, the parties attempted, through their counsel, to arrange for the exchange of equipment. Exh. D-175. However, before any exchange took place, RBI learned that PTN was in arrears in its payments to Sony Financial and that Sony Financial had sued PTN in federal court in Philadelphia. Sony sought the amounts loaned under the leases and possession of the equipment covered by the leases. Because PTN did not answer the complaint, Sony obtained a default judgment. N.T. 3/12/2004 at 60-61, Exh. D-176. The Order issued by Judge Dalzell gave Sony the right to repossess the equipment that it had leased to PTN. Exh. D-176. Pursuant to the Order, the equipment could not be turned over to PTN. N.T. 3/12/2004 at 62. Eugene Cliett agreed at trial that Sony, rather than PTN, had the right to dispose of that equipment. Id. When Sony Financial contacted RBI about re-possessing the former PTN equipment, RBI negotiated with Sony Financial to acquire the equipment. Exh. D-177.

Therefore, while it is true that RBI acquired possession of certain equipment that had previously belonged to PTN, PTN's claim that RBI "misappropriated" that equipment from PTN is unfounded. The court finds that RBI legitimately acquired that equipment for value. Thus, PTN's claim for $119,803.00 plus $17,970.45 interest, fails.

5. PTN's Claim for Damages for Liabilities to Third Parties is Denied.

PTN maintains that as a result of the termination of the TBA, PTN went into a "free fall" since it had no revenues, but substantial obligations. PTN's FFCL p. 63; N.T. 3/9/2004 at 98. PTN claims that RBI owes PTN $60,000.00 on account of obligations to Verizon. Exh. P-275; N.T. 3/9/2004 at 155. Because the court holds, *infra* at p. 64, that PTN is entitled to lost profits, PTN's claim for the $60,000.00 owed to Verizon fails. When PTN collects their lost profit damages they have the option to pay their outstanding debts. Therefore, PTN's claim for this item of damages is denied.

6. PTN's Claim for the $500,000.00 Advance Fails in part.

Schedule 3.1 of the TBA dictates that PTN was to advance $500,000.00 to RBI, beginning with a $100,000.00 "non-refundable" deposit, to pay RBI's outstanding obligations. In fact, PTN paid RBI $500,000.00. N.T. 3/19/2004 at 7-8. PTN alleges that the $500,000.00 advance paid to RBI at the beginning of the parties' relationship was a loan, and that therefore, PTN is due $500,000.00 plus $75,000.00 interest. The decision of whether to award PTN the $500,000.00 will begin with an analysis of the pertinent sections of the TBA.

The TBA does not describe this payment as a loan. The obligation to pay $500,000.00 is set forth in Schedule 3.1 of the TBA. Exh. P-1. According to the TBA Schedule 3.1, "[s]imultaneously with the execution by all parties of this Agreement,

[PTN] shall pay [RBI] the amount of One Hundred Thousand Dollars ($100,000.00) as a *non refundable deposit* which shall be used by [RBI] to pay outstanding obligations." Exh. P-1 (emphasis added).

The second payment of $400,000.00 was to be paid within five business days after the Commencement Date of the TBA. The payment was described as an "advance" to RBI for the purpose of paying past due balances, legal fees and other accounts payable. Id. Although the word "advance" could be used to describe a loan, it does not necessarily carry that meaning. According to The American Heritage Dictionary of the English Language, "advance" also means "payment of money before due . . ."

The TBA does not characterize the $500,000.00 as a loan. In fact, Richard Glanton, the chairman of PTN and an attorney, conceded that Schedule 3.1 does not set out that the $500,000.00 was a loan. N.T. 3/10/2004 at 125. Although Mr. Glanton testified that it was his understanding that the $500,000.00 was to be repaid,[56] Mr. Glanton further acknowledged that he did not request a note to evidence a $500,000.00 loan. Id. at 126.

The parties in this case, with the help and guidance of experienced lawyers, drafted the TBA.[57] The TBA does **not** describe the $500,000.00 as a loan. To the contrary, Schedule 3.1 specifically states that the first $100,000.00 was non refundable. The only evidence that PTN introduced at trial to support its claim that the $500,000.00 was a loan, was the testimony of Richard Glanton. Mr. Glanton's testimony, that in his

[56] Id. at 114.
[57] Brian A. Johnson, Esquire, PTN counsel who participated in the negotiations and drafting of the TBA and the Option Agreement, has been practicing law for 37 years and currently specializes in administrative law, business and finance and corporate law. More particularly, Mr. Johnson specializes in FCC matters. N.T. 3/19/2004 at 4-5. The principal lawyer representing RBI in connection with their license renewal proceedings before the FCC, Thomas J. Hutton, Esquire, has been practicing communications law since 1981. N.T. 3/17/2004 at 108.

mind the $500,000.00 was a loan, was incorrect, at least with respect to the initial $100,000.00 payment. Exh. P-1, Schedule 3.1. The court finds that plaintiff did not present sufficient evidence to establish that the $500,000.00 advance was intended to be a loan. Accordingly, PTN's claim for $500,000.00 plus $75,000.00 interest is denied.

However, the court finds that RBI breached the TBA, in part, by paying its own employees Christmas bonuses in the amount of $5,000.00 and by paying $20,000.00 to Tom Root. Accordingly, RBI must reimburse PTN $25,000.00 plus $1,500.00 interest.

6. PTN's Claim for Lost Profits is Granted.

PTN argues that as a result of the wrongful termination of the TBA, PTN has suffered, and continues to suffer until its rights under the TBA are reinstated, damages in the form of lost profits. PTN's FFCL, p. 59; Exh. P-252. PTN claims that they have lost profits in the amount of $3,271,449.00 plus $246,609.00 in interest through December 31, 2003. Exhs. P-252; P-275; N.T. 3/12/2004 at 48-49. PTN argued that, should the court award damages in lieu of reinstatement of the TBA, PTN is entitled to an additional $3,046,312.00. This amount represents lost profits through November, 2006. Exh. P-275. While RBI's expert, John Del Roccili, testified that he agreed with PTN's estimate of revenues,[58] he disagreed with the amount of incremental expenses that must be deducted from those revenues. Exh. D-181. Mr. Del Roccili opined that certain incremental expenses totaling $2,733,093.00 were not included in PTN's incremental costs and that these additional incremental costs must be subtracted from lost profits.

Mr. Del Roccili testified that "incremental" "basically means whatever the costs are to generate a product." N.T. 3/15/2004 at 53. Mr. Del Roccili's definition is consistent with the law on this subject. According to Jessup & Moore Paper Co. v.

[58] N.T. 3/15/2004 at.53.

Bryant Paper Co., 297 Pa. 483, 494, 147 A. 519, 524 (1929), lost profits are calculated by determining the revenues that a plaintiff would have received during the breach and subtracting from them the costs plaintiff would have incurred to obtain the lost revenues. However, Mr. Del Roccili's accuracy in determining lost profits ends with his correct assessment of what constitutes an incremental expense.

The law requires that for an expense to be incremental there must be a causal nexus between the incremental expense and plaintiff's lost revenues. Id. Common sense directs that, when a lost profit analysis is undertaken where profits could have been generated by more than one source, one must show with specificity which source produced the profits. Mr. Del Roccili failed to do this.

Despite the fact that Mr. Del Roccili knew that PTN, during the period of time the TBA was in effect, operated two television stations, Channel 7 and Channel 51,[59] he testified unequivocally that he did not analyze by category or specific item the costs and expenses incurred by PTN to operate Channel 7 separate and apart from Channel 51. N.T. 3/15/2004 at 50-51. For this reason, Mr. Del Roccili failed to show that the incremental expenses were specific to Channel 51, WTVE. Therefore, RBI failed to prove that the incremental expenses should be subtracted from the lost profits.

Although there are no Pennsylvania appellate cases on the issue of defendant's burden with regard to disproving damages, this court will follow the Common Pleas Court of Dauphin County which suggested that "common sense would dictate that it is defendant's burden to challenge plaintiff's damages. Placing that burden on the plaintiff would seriously undermine the adversarial nature of our trial system." Moyer v. White, 48 Pa. D. & C.3d 487, 503 (C.P. Dauphin County, 1988). Additionally, this court accepts

[59] N.T. 3/15/2004 at 47.

the Dauphin County Courts' reliance on 22 Am. Jur. 2d § 402 at 489 (1988), which provides:

> Generally, the plaintiff is obligated to establish the amount of damages using only one measure, although other measures may be applicable and even though a different measure of damages would yield a lesser award, it is the defendant's obligation to prove that a lesser amount than that claimed by plaintiff would sufficiently compensate for the loss.

Because the court finds that RBI did not sustain its burden to prove the additional incremental expenses it claims should be subtracted from lost profits, the court will award PTN its lost profits. The court does not find that specific performance should be granted with regard to the reinstatement of the TBA.

A. RBI's Claim That Certain Mitigating Revenues Must be Subtracted From Lost Profits is Denied.

Mr. Del Roccili contended that PTN's revenues from operating Channel 7 in 2002 and 2003 were "mitigating revenues," which revenues he subtracted from RBI's total revenues to arrive at net revenues.[60] N.T. 3/15/2005 at 22-23; Exh. D-181.

It is RBI's burden to show that PTN could have, but did not lessen its harm. Our courts have long held that such a defense is by way of mitigation and the burden is upon (he) him who asserts it. Coates v. Allegheny Steel Company, 234 Pa. 199, 83 A. 77 (1912). *See also* Borough of Yeadon v. Montgomery, 72 Pa. Commw. 31, 455 A.2d 785 (1983); Savitz v. Gallaccio, 179 Pa. Super. 589, 118 A.2d 282 (1955).

PTN was taken off the air by RBI in August 2001. Therefore, the revenues generated by PTN in 2002 and 2003 were attributable to PTN's operation of Channel 7, having no connection with WTVE. This court finds that RBI did not sustain their burden with respect to mitigating revenues.

[60] The witness used the RBI revenues for that period of time than PTN was taken off the air, believing that they would have been comparable.

B. RBI's Claim That Certain Commissions Must be Deducted From PTN's Lost Profits Fails

Likewise, this court finds that RBI did not sustain its burden with regard to commissions that it claims should be subtracted from PTN's lost profits. Rather than determining what PTN's actual commission expenses would have been, Del Roccili used commission figures provided by Tom Root. N.T. 3/15/2004 at 29-30; Exh. D-181. When asked about his calculation related to commissions, Mr. Del Roccili testified:

> There were commission costs that were discussed in the plaintiff's deposition. In order to get the kind of programming, there would be certain commission costs that will be incurred.
>
> So I just utilized, there was not place in their costs – there's a variety of items that aren't necessarily included in the cost estimate that I used. It seems like we're getting into – I don't know exactly what was going on at that period to time but the cost numbers were substantially lower than other periods during that year. So there's a number of cost categories that aren't in there.
>
> There's no programming costs, for example, as I remember, and there's nothing for commissions and in going forward in the but-for world, there's likely to be commission costs.
>
> There were commissions costs for RBI. I just used RBI's costs and substituted them in as an example of one of the cost elements that was not accounted for.

N.T. 3/15/2004 at 29-30.

As noted, the burden falls to defendant when the defendant challenges plaintiff's estimation of damages. Mr. Del Roccili's basing his conclusions on figures supplied to him in summary form[61] by Tom Root, a member of the RBI organization, is not sufficient to prove Del Roccili's conclusion regarding prospective commissions. Mr. Del Roccili accepted the information given to him by RBI without testing, verifying or substantiating the accuracy or completeness of the information. N.T. 3/15/2004 at 37-38. Moreover,

[61] Exh. P-278.

Mr. Del Roccili failed to obtain financial statements from RBI's outside accountants. Id. at 42. In addition, using RBI's commission figures and mapping those figures onto a projection of PTN's commissions would not be valid. RBI did not offer evidence that supports the speculative notion that PTN would do business in the same way that RBI operated their business. The court finds that RBI failed to sustain its burden of proof with regard to the projected commissions that they believe should be deducted from lost profits.

7. PTN's Claim for Monetary Damages in Lieu of Reinstatement is Granted.

PTN seeks reinstatement of its rights under the TBA. Exh. P-230. In the alternative, PTN claims that it is entitled to monetary damages in lieu of the reinstatement. PTN's FFCL at 63; Exh. P-252.

According to the Restatement (Second) of Contracts, § 344, cmt. a:

> [t]he law of contract remedies implements the policy in favor of allowing individuals to order their own affairs by making legally enforceable promises. Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. *It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach.*

(Emphasis added.) *See also* Adams v. Speckman, 385 Pa. 308, 312,122 A.2d 685, 687 (1956); Maxwell v. Schaefer, 112 A.2d 69, 74, 381 Pa. 13, 21 (1955).

The court holds that with regard to the issue of PTN's claim for reinstatement under the TBA, an adequate monetary remedy is available. PTN presented at trial, a lost profits analysis in lieu of reinstatement. Exh. P-253. This lost profits analysis calculates PTN's lost profits by determining the profits that PTN would have made had it been reinstated and permitted to program the Station for the duration of the term of the TBA,

until November 15, 2006. This analysis includes a list of expenses and an amount that represents net sales. Id. P-253. Lost profits are available under Pennsylvania law "where (1) there is evidence to establish them with reasonable certainty . . ." Delahanty v. First Pa. Bank, N.A., 318 Pa. Super. 90, 120, 464 A.2d 1243, 1258 (1983).

This court is persuaded that this analysis constitutes adequate proof of lost profits.

PTN's lost profits in lieu of reinstatement calculation differs from the lost profit analysis.[62] The lost profits analysis in lieu of reinstatement sets out the following proviso: "Revenues are adjusted from those reflected in Exhibit A to account for programming changes that would have been made by Plaintiff had it been reinstated." Exh. P-252. PTN's lost profits in lieu of reinstatement calculation utilizes the same amount of expenses as its lost profits analysis. Exhs. P-252; P-253. However, lost profits in lieu of reinstatement for the period from December, 2003 until November, 2006, shows a lower figure representing net sales.[63]

Therefore, the court awards PTN lost profit damages in the amount of $3,271,449.00 for the period of November 16, 1999 through December, 2003. For the period beginning January, 2004 through November 16, 2006 (the TBA's end date), the court awards PTN $3,666,775.00.[64] The total amount of lost profits awarded to PTN is $6,938,224.00.

8. The Court Grants PTN the Monetary Value of Option Shares.

PTN's expert, William Redpath, determined what he believed was the "stick value" of the Station based on a market approach using a comparable sales methodology.

[62] Exhs. P-252; P-253, respectively.
[63] Net sales for July, 2001 through December, 2003 averaged $182,279.83 per month. The lost profits in lieu of reinstatement calculation shows net sales from December, 2003 to November 2006 per month averaging $178,500.00.
[64] This figure represents $104,765.00 times 35 months.

N.T. 3/11/2004 at 18, Exh. P-219, p. 57. Mr. Redpath testified that "stick value" refers to the value of a television station without measurable market share, as the value of the station equals the value of its license and physical assets. N.T. 3/11/2004 at 22-23. Mr. Redpath arrived at the value of the Station by looking at the sales of comparable stations, specifically UHF independent stations in markets ranked 3 through 11 having a zero 09:00-Midnight audience share in all Neilson books that were sold between November 1999 and the report date, and had a reported sales price. N.T. 3/11/2004 at 24; Exh. P-219, p. 57.

Mr. Redpath considered each of the following variables: (1) the population within the station's Grade A signal contour, (2) the population with the station's Grade B signal contour, (3) the percentage of the market's population that is Hispanic/Spanish-speaking, (4) the number of cable homes in that television market, (5) the number of commercial television stations in that market with positive (non-zero) shares, and (6) the month number, numbering November 1999 as month number one, numbering each month sequentially. N.T. 3/11/2004 at 27-29, 96; Exh. P-219, pp. 57-58; Table 13. Mr. Redpath also included in his analysis of the value of the station a construction permit for a particular WTVE antenna site that would increase the antenna height from the existing 751 feet to 843 feet and would increase the Station's ERP from 1,450 to 4,950 kilowatts. N.T. 3/11/2004 at 20; Exh. P-219, p. 3. He testified that these differences would "make the television signal better and reach more households." Id. at 21. Mr. Redpath concluded that the value of WTVE at the time of trial was $33,750,000.00. Exh. D-169.

RBI's expert, Lawrence Patrick, like Mr. Redpath, came to valuation of the Station using a "Market-based Comparable Sales Approach" methodology. Id. at 4.

Additionally, Mr. Patrick agreed with Mr. Redpath, that the Station was best categorized as a "stick." Id. Mr. Patrick testified that

> [g]iven that a stick transaction by its very nature is not based on the historical financial performance of the television station, stick transactions are most often valued based on a value, or price, paid per television household. This price per household is then multiplied by the estimated number of TV households that are within the over the air signal coverage area of the station . . . The price per TV household that buyers are willing to pay varies primarily by market size and the size of the population base covered by a station's over-the-air signal.

Id. at 5.

In determining the number of households, Mr. Patrick believed that "an important factor with regard to determining a fair market value for WTVE-TV is the size of the population base that is covered by WTVE-TV's over-the-air signal. More specifically, it is the size of the population base covered by what is defined as the Grade A signal." Id. at 6. Mr. Patrick concluded in his report that the reach of WTVE's grade A signal excludes it from the Philadelphia DMA. He writes that, "[i]n fact, as the Grade A signal contour on the coverage map shows, at best, a small portion of the station's Grade A contour covers the very far northwest fringe of the Philadelphia market." Id. at 7. Based upon his analysis, Mr. Patrick concluded that WTVE had a fair market value, as of December 21, 2001, of $17,898,772.00.

Mr. Patrick and Mr. Redpath's opinions regarding the valuation of the Station differ in two important respects. Mr. Patrick does not consider the construction permit for the Mt. Penn site which, if acted upon, would substantially increase the Station's reach, and Mr. Patrick does not consider the households covered by the Station's Grade B contour.

As to the Mt. Penn site, confusion reigns. Regarding the construction permit, PTN failed to prove that WTVE has been granted the FCC construction permit. Mr. Redpath stated that the permit was granted. It appears from RBI's 2001 Annual Report that RBI had applied for the permit and that RBI had invested $100,000.00 in its Mt. Penn transmitter site "in preparation for new transmitter and future power increase." Exh. P-244. However, Mr. Patrick testified that there was an application for a construction permit, but that permit was never granted. N.T. 3/17/2004 at 199. Moreover, PTN did not present a copy of the permit, nor did PTN introduce evidence that the township in which the new transmitter was to be built was in agreement with the proposed construction.

(a) The Monetary Value of the Shares Is Important In That the Court Does Not Believe That Specific Performance is Proper Under The Circumstances.

A decree of specific performance is a matter of grace and not of right. Clark v. Pennsylvania State Police, 496 Pa. 310, 313, 436 A.2d 1383, 1385 (1981), *citing* Mrahunec v. Fausti, 385 Pa. 64, 121 A.2d 878 (1956). Specific performance should only be granted where the facts clearly establish the plaintiff's right thereto, where no adequate remedy at law exists, and where justice requires it. Roth v. Hartl, 365 Pa. 428, 75 A.2d 583 (1970).

The court submits that this is not a case for specific performance. The court believes that a monetary award can compensate PTN for the value of the options it is entitled to. That being said, given the disparity between the valuations proposed by Mr. Patrick and by Mr. Redpath, the court does not feel comfortable assigning a value to the station. Instead, the court submits that justice requires a neutral appraiser be designated

to value the station. The mechanism by which a neutral appraiser is to be appointed is as follows: PTN should choose an appraiser, RBI should choose an appraiser and these two valuation experts will choose a neutral appraiser.[65] Among them, they will determine the value of WTVE.

The court holds that, because RBI breached the TBA and that breach resulted in a breach of the Option Agreement, PTN is awarded the right to exercise their options under the TBA. Furthermore, the value of those options must be reduced by the amount of the second anniversary payment, $296,984.94, as that amount would have been paid had the TBA not been wrongfully terminated by RBI. .

RBI'S COUNTERCLAIMS

RBI's counterclaims against PTN are: (1) Declaratory Judgment, (2) Breach of Contract, (3) Conversion, (4) Tortious Interference with Contract, and (5) Civil Conspiracy and Intentional Tort. Exh. D-231.

1. RBI's Claim for Declaratory Judgment is Denied.

RBI claims that as a result of PTN's continuous and uncured defaults of its obligations under the TBA, RBI is entitled to a declaratory judgment (a) that PTN has materially breached the TBA, and (b) that RBI's termination of the TBA was proper and justified under the circumstances. Id.

But, the court has ruled that RBI breached the TBA and that RBI's termination of the TBA was improper.

[65] In an effort to minimize costs for the litigants one approach could be for a neutral appraiser to work with the reports of Messrs. Redpath and Patrick. However, the court does not intend to tell counsel how to achieve the stated goal.

2. RBI's Claim for Invoices Open at Termination is Granted.

RBI claims that PTN breached the TBA by failing to pay RBI's documented costs and expenses. Id. RBI claims that the total amount owed is $99,932.61.[66] RBI's FFCL at p. 163, ¶ 547.

According to RBI, at the time that the TBA was terminated on August 6, 2001, there were several invoices which RBI had previously submitted to PTN for reimbursement, but remained unpaid. Trial Exhibit D-150 is a computer-generated document reflecting records and data that RBI claims was kept in the ordinary course of business. N.T. 3/19/2004 at 35. RBI claims that this document reflects all invoices sent by RBI to PTN that remain unpaid. Id. This report shows that PTN owes RBI $172,883.50. Exh. D-150.

This figure is RBI's starting point in calculating what PTN owes RBI. RBI then subtracted certain credits. Exh. D-172; N.T. 3/19/2004 at 102-03, 112.[67] These credits equal $35,926.55, bringing the total allegedly owed RBI to $136,956.85. In addition, during the course of the trial, Barbara Williamson, RBI's bookkeeper, admitted that on one occasion she mistakenly billed PTN for a $2,000.00 charge towards Tom Root's salary even though she had already billed PTN for Tom Root's entire salary. This $2,000.00 charge was an error and RBI agrees that PTN is entitled to a credit in this amount. N.T. 3/19/2004 at 102-03. This reduces the amount owed to RBI from $136,956.85 to $134,956.85. RBI's FFCL, ¶ 541. Furthermore, the parties agreed that

[66] This amount takes into consideration the amount RBI claims PTN paid for pre-TBA legal fees, which amount it admits constitutes a loan to be repaid to PTN. RBI's FFCL, ¶544. This amount differs from the amount the court finds RBI owes PTN due to pre-TBA Holland & Knight invoices. *See*, *supra.* pp 54-55.
[67] These credits include sales commissions paid to Brenda Peiffer and Frank McCracken in connection with programming sold for broadcast during the hours reserved to RBI, double-billing of Holland & Knight legal fees, a double-billing to PTN of utility charges, telephone charges of Barbara Williamson, Tom Root expenses erroneously billed to PTN and a charge for a family dinner of Frank McCracken's. Exh. D-172.

PTN is entitled to a credit for the time that the Station was off the air (from July 29 through August 2, 2001), and have further agreed that the amount of that credit is $11,500.00. N.T. 3/19/2004 at 112. This credit reduces the amount that PTN owes to RBI from $134,956.85 to $123,456.85. RBI's FFCL at ¶ 542. Finally, RBI makes a claim for the initial retainer payment of $25,000.00 that was paid by RBI. The court holds that Mr. Parker's legal representation was reimbursable by PTN. RBI's FFCL at ¶ 546. Therefore, the $25,000.00 attributable to Mr. Parker's legal representation must be added to $123,456.85, bringing the total owed to RBI by PTN to $148,456.85. Thus, the court awards RBI $148,456.95.

3. RBI's Claim for Conversion Is Denied.

RBI asserts a claim for conversion on account of allegedly misappropriated checks in the amount of "something less" than $10,000.00. Exh. D-231.

The court holds that RBI did not sustain its burden of proof with regard to this claim. RBI's claim for conversion is denied.

4. RBI's Claim for Tortious Interference with Contract is Denied.

RBI claims that PTN, through its officer, Richard Glanton, improperly interfered with RBI's contractual relationship with the Reed Smith law firm by, among other things, falsely representing to Reed Smith that RBI was requesting the withdrawal of Reed Smith as counsel for RBI, and later by causing Reed Smith to withdraw as counsel for RBI. Exh. D-231.

To establish its claim for tortious interference with contract, RBI must demonstrate: (1) the existence of a contractual relationship, (2) an intent on the part of PTN to harm RBI by interfering with that contractual relationship, (3) the absence of a

privilege or justification for such interference, and (4) damages resulting from the defendant's conduct. Hennesy v. Santiago, 708 A.2d 1269, 1278 (1998).

RBI did not prove that PTN intended to harm RBI by interfering with RBI's relationship with Reed Smith. Thus, RBI's claim for tortious interference with contract fails.

5. RBI's Claim for Civil Conspiracy and Intentional Tort is Denied.

RBI claims that, beginning in the spring of 2001, PTN together with and in conspiracy with Richard Glanton, Richard Dimeling and the investment firm of Dimeling Schreiber & Park, "embarked on a campaign of conduct deliberately designed to squeeze RBI's cash flow, financially strangle RBI, and cause RBI's shareholders to lose the value of their investment in RBI." Exh. D-231.

In order to prevail in a civil action for conspiracy, plaintiff (counterclaim plaintiff in this case) must prove the following: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose, (2) an overt act done in pursuance of the common purpose and (3) actual legal damage." McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (2000). Further, "[p]roof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." Skipworth by Williams v. Lead Indus. Ass'n, 547 Pa. 224, 235, 690 A.2d 169, 174 (*citing* Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979)).

The court submits that RBI has not sustained its burden of proof with regard to this claim. RBI did not present sufficient evidence to persuade this court that PTN's actions during the life of the TBA were fueled by a malicious intent. Accordingly, RBI's

claim for civil conspiracy and intentional tort is denied.[68]

CONCLUSIONS OF LAW

1. RBI breached the TBA by failing to provide PTN with an accounting of the $500,000.00 advance.

2. RBI paid its own employees with the $500,000.00 advance, in violation of the TBA.

3. PTN is awarded $25,000.00 which amount represents a $20,000.00 payment to Tom Root and Christmas bonuses totaling $5,000.00 to RBI employees, as these payments were improperly made from the $500,000.00 advance.

4. RBI breached the TBA by withholding the *pro rata* credit provided for in the TBA for broadcasting at less than 50 percent ERP. Therefore, the court awards PTN $1,418,687.00.

5. As evidenced by the language of the TBA and the Option Agreement and the circumstances surrounding the formation of these agreements, the TBA and the Option Agreement must be read as one single transaction.

6. RBI's breach of the TBA constituted a breach of the Option Agreement. Therefore, PTN was excused from abiding by the terms of the Option Agreement, i.e., paying the second anniversary payment.

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[68] This court recognizes that this determination may seem to contradict its holdings related to PTN's Motion for a Preliminary Injunction. In its Opinion on the Motion for a Preliminary Injunction, the court wrote "the evidence showed that plaintiff had been and may continue to 'financially strangle' defendant if an injunction were to issue.' " Findings of Fact, Conclusions of Law and Discussion in Support of This Court's Order Denying Plaintiff's Motion for a Preliminary Injunction, p. 22.

It is important to note that the hearing on the Motion for Preliminary Injunction was held over the course of two days as compared to the nearly one-month long trial. Considerable additional evidence presented at trial shows that the court had only part of the story at the injunction hearing.

7. PTN's claim for RBI's alleged improper withholding of revenues fails as RBI only withheld revenues for hours reserved for RBI's own programming consistent with the relevant provisions of the TBA.

8. PTN's claim for fraud and deceit is barred by the gist of the action doctrine.

9. PTN's claim for "overcharges" fails in part. The claim for alleged payroll "overstatements" and the attendant health insurance charges is denied because, under the terms of the Amendment to the TBA, PTN was obligated to reimburse RBI for salaries related to master control operations.

10. PTN's claim for certain professional association dues is granted as the dues at issue were not expressly set out for reimbursement by PTN in the Time Brokerage Agreement. Therefore, the court awards PTN $1,171.00.

11. PTN's claim for charges related to a "non-reimbursable" car is denied as this charge was an additional expense that RBI determined was appropriate in its reasonable discretion under the December 1, 1999 supplemental agreement.

12. PTN's claim for Thomas Root's "non-reimbursable" expenses is denied because certain of these expenses were related to litigation that, under the TBA, PTN was obligated to pay. With regard to the remaining charges, PTN did not sufficiently prove this item of damages and in the event that these charges were related to Master Control Operations, PTN paid the expenses despite the language contained in the supplemental agreement that provided PTN with a mechanism by which they were required to dispute costs.

13. PTN's claim for George Mattmiller's "non-reimbursable" expenses is denied as certain of these expenses were related to litigation that was to be paid by PTN. As to the remaining charges, the proof offered at trial to prove these charges was insufficient.

14. PTN's claim for Frank McCracken's expenses is denied. The court lacks sufficient evidence to tease out specific amounts related to these expenses. Therefore, PTN did not sustain its burden of proof with regard to this item of damages.

15. PTN's claim for Michael Parker's "non-reimbursable" expenses is denied. PTN did not sufficiently prove that this item of damages was not appropriate for reimbursement by PTN under the TBA.

16. PTN's claim for a $10,000.00 retainer for litigation related to RBI's defense in the Telemundo litigation fails as the TBA is clear that PTN was to reimburse RBI for expenses related to the Telemundo litigation.

17. PTN's claim for reimbursement of Michael Parker's legal expenses is denied as the TBA is clear that PTN was to reimburse RBI for expenses related to the Telemundo litigation.

18. PTN's claim for damages related to RBI's failure to return equipment is denied. PTN had defaulted on its leases for this equipment and RBI, rather than "misappropriating" the equipment, simply purchased the equipment from the lesssor.

19. PTN's claim for $60,000.00 it owes Verizon on account of RBI's wrongful termination of the TBA fails. As this court awards PTN lost profits, PTN has the obligation to pay outstanding debts.

20. PTN's claim for the $500,000.00 advance fails as this advance was not a loan.

21. PTN's claim for lost profits is granted. The court holds that specific performance in the form of a reinstatement of the TBA is not an appropriate remedy since an adequate monetary remedy is available. Therefore, the court awards PTN $6,938,224.00.[69]

22. RBI's claim that certain mitigating expenses must be subtracted from PTN's lost profits fails. RBI did not sustain its burden in establishing a basis upon which the mitigating expenses claimed could be attributed to WTVE, Channel 51, as opposed to PTN's Channel 7.

23. RBI's claim that certain commissions must be deducted from PTN's lost profits is denied because RBI's calculation and analysis are based on speculative data.

24. RBI's counterclaims for declaratory judgment, conversion, tortious interference with a contract and civil conspiracy and intentional tort are denied.

25. RBI is entitled to $148,456.95, an amount which represents monies owed to RBI by PTN under the TBA for unpaid invoices and Michael Parker's legal counsel's retainer.

26. PTN is awarded $80,238.36 for monies paid to Holland & Knight for services rendered prior to November 16, 1999, as that amount was an agreed upon loan to RBI.

27. In summary, the court awards PTN $8,314,863.41. This amount is comprised of:

	Pro Rata Credit for Broadcasting At less than 50% ERP	$ 1,418,687.00
plus		
	Reimbursement of Professional Association Dues	$ 1,171.00
plus		
	Lost Profits	$ 6,938,224.00
plus		
	Monies Paid by PTN for Legal Services Rendered by Holland & Knight Prior to November 16, 1999	$ 80,238.36
plus		

[69] The amount of salaries and health care benefits in dispute were averaged and subtracted from the amount awarded to PTN for lost profits for the period through December 31, 2003.

Payments Made to RBI's Employees From the $500,000.00 Advance	$	25,000.00

(Subtotal $8,463,320.36)

minus

PTN Obligation for Unpaid Invoices Under the TBA and Michael Parker's Legal Counsel's $25,000.00 Retainer	$	148,456.95

26. PTN's claim for the monetary value of the Option shares assigned to PTN under the Option Agreement is granted.

27. Due to the wide disparity between the experts' valuations with regard to the value of WTVE, the court holds that each party much choose an appraiser, and the two appraisers must choose a neutral appraiser. Among all three, a value for the station will be determined. Once the station has been appraised, PTN is awarded the value of their options minus the second anniversary payment of $296,984.94, which would have been paid had the TBA not been wrongfully terminated.

28. No provision has been made for interest on the monetary obligations owed. The court believes it needs to hear from counsel on the issue of interest - - that is, if pre-judgment interest is appropriate and, if so, from what date should it be computed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.