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

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FEDERAL COMMUNICATIONS COMMISSION
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In re applications of)	MM Docket No. 92-310
)	
ROBERT M. RICHMOND)	File No. BPH-910703MD
)	
BARBARA BRINDISI)	File No. BPH-910703MI
)	
LAURYN BROADCASTING CORPORATION)	File No. BPH-910703MJ
)	
For a Construction Permit)	
for a New FM Station on Channel)	
265A in Beaumont, California)	
)	
and)	
)	
KAY SADLIER-GILL)	File No. BPH-910611IF
)	
For Modification of the Facilities)	
for Station KATY-FM,)	
Idyllwild, California)	

To: Honorable Walter Miller
Administrative Law Judge

OPPOSITION TO PETITION FOR LEAVE TO AMEND

Barbara Brindisi, by counsel and pursuant to Section 1.294 of the Commission's rules, hereby respectfully opposes the Petition for Leave to Amend filed by Lauryn Broadcasting Corporation ("Lauryn") in the above-identified proceeding on February 10, 1993. Lauryn's Petition should be denied because there is no good cause shown to accept an amendment of this nature at this stage in the proceeding. In opposition to Lauryn's Petition, the following is respectfully stated.

Lauryn seeks to amend her application so as to identify a substitute source of financing. Lauryn's application was filed on July 3, 1991. In that application, Lauryn identified its source of financing as the World Trade Bank. In its Petition, Lauryn states that it relied upon a letter dated July 1, 1991,

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signed by Peter F. Lambert, Senior Vice President of that institution. Now, for the first time, Lauryn informs the Commission that it believes that that bank letter is no longer valid and that its 100% owner, Lauryn Cox, came to believe that that letter was invalid before the end of July, 1991. As a substitute source of financing, Lauryn now advises the Commission for the first time that it is relying upon a letter from Superior Financial Mortgage Lending Services dated August 1, 1991.

The acceptability of post-designation amendments is governed by Section 73.3522(b) of the Commission's rules, and the explanations of Erwin O'Conner Broadcasting Company, 22 F.C.C.2d 140 (Rev.Bd. 1970). To be acceptable, an amendment must pass a six-element test: (1) The amendment cannot be voluntary or necessitated by events which the applicant could have reasonably foreseen; (2) The applicant must have acted with due diligence in preparing and filing the amendment when it discovered the need; (3) Acceptance of the amendment must not result in the comparative upgrading of the application; (4) Acceptance of the amendment must not give rise the need to add new issues or new parties to the proceeding; (5) Acceptance of the amendment must not be unfair to the applicant's opponents; and (6) Acceptance of the amendment must not cause any disruption or delay to the proceeding.

Lauryn's amendment fails at least three prongs of the Erwin O'Connor test: (1) it is voluntary and/or necessitated by events which Lauryn should have foreseen; (2) Lauryn has not acted with diligence in proffering its amendment; and (3)

acceptance of the amendment would require the addition of a financial qualifications issue against Lauryn to determine whether reliance on the substitute source of financing is legitimate.

**LAURYN'S AMENDMENT IS VOLUNTARY AND UNNECESSARY,
BUT IN THE ALTERNATIVE,
LAURYN SHOULD HAVE ANTICIPATED THE NEED TO AMEND**

If one accepts the original validity of the July 1, 1991 letter from the World Trade Bank, as apparently Lauryn did when it certified and filed its application, there exists now no apparent need or justification for an amendment filed so long after the deadline for amendments as a matter of right. Lauryn's principal, Lauryn Cox, now apparently believes that that letter is not valid. That belief stems from an oral indication from the bank vice president who wrote the letter that he was leaving the bank and that he was uncertain whether the bank would continue to support Lauryn's project in his absence. But the Petition for Leave to Amend and Cox's declaration accompanying the Petition are devoid of any concrete evidence that the World Trade Bank has definitely withdrawn or rescinded its letter.

Indeed, the Presiding Judge has already inquired about that point to Lauryn and asked that any documents evidencing such an action by the Bank be produced. Lauryn's counsel has represented in his document production cover letter dated February 18, 1993 that no such documents exist. Given only the paper evidence which Lauryn has supplied, it appears that the World Trade Bank has not required Lauryn to search elsewhere

for its financing and Lauryn's act of inserting substitute financing is a voluntary one. As a voluntary amendment, Lauryn's filing does not meet the requirements of Section 73.3522(b) or of Erwin O'Conner.

On the other hand and from a totally different perspective, reliance upon the July 1, 1991 letter from the World Trade Bank was misplaced from the beginning because of the internal inadequacies of that letter. As soon as Lauryn certified that it was financially qualified with that letter as the basis for its qualification, the eventual need to amend should have been obvious to Lauryn -- even absent the expression of doubt from the letter's author, Peter Lambert, about whether the bank would continue to be interested in funding Lauryn's proposed station.

The World Trade Bank letter does not express the bank's firm present intention to lend Lauryn the funds needed (even subject to the routine contingencies about credit worthiness). Rather, the Lambert letter of July 1, 1991 merely "confirm[s] the willingness of our Bank to consider a loan to you, . . ." (emphasis added). This letter is no commitment to lend. It is only a commitment to consider lending.

Commission precedent is clear that to be valid, a financing letter must expressly state the prospective lender's present firm intention to make the loan, future conditions permitting. Merrimack Valley Broadcasting, Inc., 82 F.C.C.2d 166, 167 (1990). A promise only to consider the project in the future without expressing a present firm intention to provide

the funds is short of the Commission's long-established requirement. See, Fox Television Stations, Inc., 5 F.C.C.Rcd. 5255 (1990) (a "willingness to consider" a loan found insufficient); John D. Bomberger, 7 F.C.C.Rcd. 5516 (Rev.Bd. 1992) (lender's testimony that the financing letter "represents . . . our intent to look at a loan application," was also insufficient). Lauryn should have known that the World Trade Bank financing letter was inadequate and that certifying in reliance upon it would necessitate an amendment to that certification if Lauryn had any hope of being legitimately financially qualified.

This conclusion gives rise to another reason why Lauryn's amendment is not acceptable. As Lauryn aptly points out in its Petition, a demonstration that an applicant was financially qualified at the time it certified its application is essential to a showing of good cause for accepting a late-filed financial amendment. Aspen FM, Inc., 68 R.R.2d 1635 (1991); Edwin A. Bernstein, 4 F.C.C.Rcd. 8420 (Rev.Bd. 1989), rev. denied, 5 F.C.C.Rcd. 2843 (1990). Since Lauryn was not financially qualified at the time it certified (in reliance on the World Trade Bank "noncommittal" letter), it has no good cause to support the filing of its amendment now, and that proffered amendment must be rejected.

LAURYN HAS NOT ACTED WITH DUE DILIGENCE

Lauryn admits in its Petition that it believed that the World Trade Bank letter was invalid in July, 1991. Yet it waited some nineteen months, until February, 1993, to seek

leave to amend its application. Lauryn principal Lauryn Cox submits a lengthy declaration with the Petition for Leave to Amend in which she attempts to lay the blame for this tardiness entirely upon Lauryn's former communications counsel, Gary Smithwick, and asks to be excused for failing to timely file her amendment because she "reasonably relied" on Lauryn's attorney. However, it is a well-settled principle that parties before the FCC cannot escape the consequences of the action or lack of action on their behalf by their counsel. Emission de Radio Balmeseda, Inc., 7 F.C.C.Rcd. 3852 (Rev.Bd. 1992); Pontchartrain Broadcasting Company, Inc., 7 F.C.C.Rcd. 3264 (Rev.Bd. 1992); Carol Sue Bowman, 6 F.C.C.Rcd. 4723 (1991); Comuni-Centre Broadcasting v. FCC, 856 F.2d 1551 (D.C.Cir. 1988), cert denied, 489 U.S. 1083 (1989); Asheboro Broadcasting Company, 20 F.C.C.2d 1 (1969). Lauryn's amendment is inexcusably late, regardless of whether the lateness was counsel's fault, and Lauryn must endure the consequences.

But even if Lauryn could somehow escape from the rule that the principal is bound by the actions of its attorney-agent, Lauryn's factual showing is too anemic to justify its claim of innocence. Cox declares that she immediately reported to Smithwick the news of Lambert's departure from the World Trade Bank and his sentiment that the Bank might withdraw its letter. Cox says that Smithwick told her to look for another financing source, which she did. When she decided to proceed with Superior Financial, Smithwick sent her a draft commitment letter for that company to sign. As soon as she had the signed

version of Superior Financial's August 1, 1991 letter, she sent copies of it to Smithwick.

But nowhere in her declaration does Cox allege that she actually instructed Smithwick to file an amendment reporting Superior Financial as the new source of Lauryn's financing. She now rather unfairly accuses him of failing to do something which she does not even claim that she requested him to do.

Given the information that has thusfar been disclosed, it could not have been clear to Smithwick that Cox intended to move her primary reliance from the World Trade Bank letter to the Superior Financial letter. There is no indication that the World Trade Bank actually did withdraw its letter -- only Lambert's and Cox's fear that it might do so. Apparently operating in an instruction vacuum, and with no evidence of an immediate legal need to announce a new financing source, Smithwick understandably opted for the status quo.

Cox implies that she assumed that Smithwick had filed an amendment to report a change in the source of the financing. However, such an assumption would have been totally without basis. Cox admits that she never received any copy of such an amendment which Smithwick might have prepared. She should also have realized that were he to file such an amendment, she would have been required to sign it. With the passage of time after sending Smithwick the Superior Financial letter and having not received a request from Smithwick to sign an amendment, Cox should have been alerted to the fact that no amendment was in the works. At that time, she should have initiated the process with Smithwick to get Lauryn's amendment on file.

Acknowledging that a statement from Smithwick would be central to proving its assertions about this scenario, Lauryn explains that Smithwick and Cox now have differing recollections of what occurred and that Lauryn is now unable to supply a statement from Smithwick. With no corroborating statement -- from Smithwick, Lambert or anyone at the World Trade Bank, -- the Presiding Judge is forced to accept Cox's declaration in the least favorable light to Lauryn's case. At best, Cox was grossly negligent in the prosecution of her application. At worst, she may be guilty of post hoc invention of a story to cover some greater calamity involving Lauryn's relationship with the World Trade Bank. In either event, Cox and Lauryn find themselves no where near the Commission's standard for acting with diligence in presenting amendments.

Lauryn seeks mercy and argues that the Commission considers requests for late amendments, particularly those involving basic qualifying issues, in the light of the equities of the case and that granting its Petition would be equitable. But Lauryn is behind the times. All of the cases it cites for that proposition have been overruled on that point. The liberal leniency of Azalea Corp., 31 F.C.C.2d 561 (1971) is no longer in style. See, Albert E. Gary, 5 F.C.C.Rcd. 6235 (Rev.Bd. 1990). The Commission now requires applicants to prosecute their applications in a prompt and orderly manner. See, Hillebrand Broadcasting, Inc., 1 F.C.C.Rcd. 419 (1986). Regardless of that, the equities of the case do not favor Lauryn -- an applicant who has dwaddled for nineteen months.

**ACCEPTANCE OF THE AMENDMENT WOULD REQUIRE
THE ADDITION OF A FINANCIAL QUALIFICATIONS ISSUE AGAINST LAURYN**

Lauryn admits that the source of its proposed substitute financing, Superior Financial Mortgage Lending Services, is not an ordinary banking institution. Indeed, the company's name denotes that it is something other than a commercial bank. It appears not to be a bona fide financial institution for the purposes of accepting its financing commitments at face value in the context of an FCC proceeding.

Where an applicant bases its financial qualifications certification upon an expectation of a loan or an investment from a source other than a bona fide financial institution, the applicant is required to look beyond the face of funding commitment and determine for itself whether the source is financially capable of fulfilling the commitment being made.

Cox's explanation of her contacts with Superior Financial Mortgage Lending Services goes into great detail. But missing in all of that detail is any reference to her research to determine the financial capabilities of the company. This is a telling omission. With plenty of time, opportunity and motivation to do so, Cox failed to delineate whether she had taken this simple precaution in connection with her decision to rely upon this new financing source. In the context of a Petition for Leave to Amend offered under the circumstances here, she certainly was constrained to provide the details of that research. In this situation, the reader is justifiably compelled to infer that Cox did not conduct that kind of research about Superior Financial.

At the very least, a material question of fact is presented which cannot be ignored. The Presiding Judge cannot rule that Lauryn's reliance upon Superior Financial is justified or legitimate without further information -- information uniquely within Lauryn's control, but which Lauryn has failed to provide. It would be impossible to conclude that Lauryn is financially qualified (in relying upon the Superior Financial letter) without further inquiry. Thus, the acceptance of the amendment would give rise to the need for the addition of a financial issue against Lauryn. Of course, this circumstance totally precludes the acceptability of the amendment.

CONCLUSION

It is clear that Lauryn's late amendment has resulted from its own negligence and lack of diligence. Acceptance of the amendment would unnecessarily delay and disrupt this proceeding with the need for hearing a financial issue against Lauryn. The amendment is not acceptable and should be rejected.

WHEREFORE, Brindisi respectfully urges the Presiding Judge to deny Lauryn's Petition for Leave to Amend.

Respectfully submitted,

BARBARA BRINDISI

By: 

Donald E. Martin

DONALD E. MARTIN. P.C.
Suite 200
2000 L Street, N.W.
Washington, D.C. 20036
(202) 887-5070

Her Attorney

February 22, 1993

CERTIFICATE OF SERVICE

I, Donald E. Martin, hereby certify this 22nd day of February, 1993, that I have caused a copy of the foregoing document to be served by United States Mail with first class postage prepaid upon the following:

* Honorable Walter C. Miller
Administrative Law Judge
Federal Communications Commission
Washington, D.C. 20554

Robert Zauner, Esquire
Hearing Branch
Mass Media Bureau
Federal Communications Commission
Washington, D.C. 20554

** Bradford D. Carey, Esquire
Hardy & Carey
111 Veterans Boulevard
Suite 255
Metairie, Louisiana 70005
Counsel for Robert M. Richmond

Cary S. Tepper, Esquire
Meyer, Faller, Weisman & Rosenberg
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
Counsel for Lauryn Broadcasting
Corporation

Eric S. Kravetz, Esquire
Brown, Finn & Nietert
1920 N Street, N.W.
Suite 600
Washington, D.C. 20036
Counsel for Kay Sadlier-Gill


Donald E. Martin

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