

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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MAY 13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 93-107
)	
DAVID A. RINGER)	File No. BPH-91123OMA
)	
ASF BROADCASTING CORPORATION)	File No. BPH-91123OMB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-91123OMC
)	
KYONG JA MATCHAK)	File No. BPH-911230MF
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
WESTERVILLE BROADCASTING COMPANY LIMITED PARTNERSHIP)	File No. BPH-911231MB
)	
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC
)	
For Construction Permit)	

To: Administrative Law Judge Walter C. Miller

MOTION TO DISMISS

Westerville Broadcasting Company Limited Partnership ("WBC") herein moves to dismiss the application of Kyong Ja Matchak ("Matchak"). In support of this motion, the following is stated:

May 10, 1993 was the date established, pursuant to Section 1.325(c) of the Commission's rules, for each applicant in this proceeding to file an integration and diversification statement and to produce certain standard categories of documents. Matchak did neither.

Furthermore, neither Matchak nor her representative appeared at the May 12, 1993 discovery conference convened pursuant to the Administrative Law Judge's directive. See Prehearing Order, FCC 93M-186, at ¶12 (released April 26, 1993). The discovery conference was convened at 10:00

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a.m. in the offices and Smithwick & Belendiuk. At approximately 10:15 a.m., a telephone call was placed to Ms. Matchak. She advised that she had retained Donald Martin as her counsel. Counsel attending the meeting then called Mr. Martin. Mr. Martin indicated that while he had spoken to Ms. Matchak, he had not yet been retained. Mr. Martin said he would speak to Ms. Matchak and call back. At approximately 11:29 a.m., Ms. Matchak called Smithwick & Belendiuk and left a message. Her call was returned by the counsel attending the discovery meeting at approximately 11:40 a.m. Ms. Matchak said that there had been a misunderstanding with respect to representation by Mr. Martin and that she would be retaining counsel in the next few days.^{1/}

The above facts demonstrate that Matchak is not ready, willing and able to prosecute her application at this time. In the short time since this proceeding has been designated for hearing, she has failed to satisfy three significant procedural requirements -- (1) the filing of an integration and diversification statement, (2) the initial production of documents and (3) attendance at a mandatory discovery conference.

The Commission has made clear that it will no longer indulge applicants' temporizing activities. E.g., Hillebrand Broadcasting, Inc., 1 FCC Rcd 419 (1986). In Hillebrand, the Commission announced it was placing greater emphasis on [its] responsibility to provide service to the public in the most efficient, expeditious manner possible and . . . that delaying the initiation of new service disserves the public interest." Id. Furthermore, it explicitly held that "prosecution of an application means timely compliance with procedural and substantive rules." Id. Here Ms. Matchak has failed to observe the Commission's procedural rules and the Presiding Judge's directives. Her application is now subject to dismissal. Matchak's failure to produce any documents

^{1/} In this last telephone call, Ms. Matchak was advised and accepted the schedule and procedures agreed to by the participants in the discovery conference.

as of the May 10 deadline is particularly significant. The Commission has specifically rules such a failure "constitute[s] a failure to prosecute, resulting in the dismissal of an applicant." Comparative Hearing Process, 6 FCC 2d 3403, 3409 n. 3 (1991).

In Comuni-Centre Broadcasting, Inc. v. FCC, 856 F. 2d 1551, 1554 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 1539 (1989), the Court set forth the appropriate factors in determining whether the dismissal of an applicant was justified: (1) the applicant's proffered justification for failure to comply with the Presiding Judge's directive; (2) the prejudice suffered by other parties; (3) the burden placed on the administrative system; and (4) the need to punish abuse of the system or to deter future misconduct.

Here, Matchak has offered no justification for her failure to comply with the procedural requirements which all other applicants have met. Her failure to follow those requirements has prejudiced the other parties in that it has created uncertainty as to Ms. Matchak's comparative position (e.g., whether she still intends to be integrated at the Westerville station, what media interests she and her husband now hold and whether they intend to divest themselves of those interests). Without that information, and the documents Matchak was to have produced, opposing applicants are handicapped in determining what discovery, with respect to Matchak is necessary or appropriate. Furthermore, Matchak's failures to comply with the rules unnecessarily have burdened the administrative system. Indeed, the Commission's discovery procedures and the Presiding Judge's Prehearing Order are fashioned in such a manner that applicants may initiate the discovery process without the intervention or supervision of the Presiding Judge. Matchak's failures, however, have made such intervention necessary. Finally, dismissal of Matchak's application is appropriate in that it serve as a warning to other applicants that procedural requirements cannot be ignored.

To put it all a different way, Matchak never got her act together and now must leave the stage.

WHEREFORE, in light of all circumstances present, this Motion to Dismiss should be GRANTED and the application of Kyong Ja Matchak (BPH-911230MF) should be DISMISSED.

Respectively submitted,

WESTERVILLE BROADCASTING COMPANY
LIMITED PARTNERSHIP

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May 13, 1993

CERTIFICATE OF SERVICE

I, Marilyn Phillips, hereby certify that on this 13th day of May, 1993, copies of the foregoing **Motion to Dismiss** were hand delivered and mailed, first class, postage prepaid, to the following:

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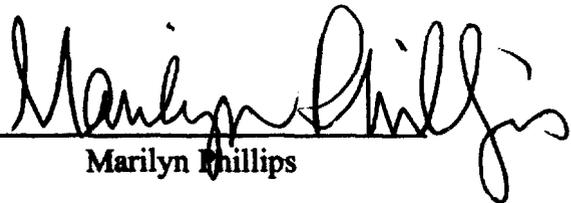
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