

ORIGINAL
FCC 93M-374

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

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In re Applications of)	MM DOCKET NO. 93-51
)	
MARTHA J. HUBER)	File No. BPH-911114ME
)	
RITA REYNA BRENT)	File No. BPH-911115MC
)	
MIDAMERICA ELECTRONICS SERVICE, INC.)	File No. BPH-911115ML
)	
STATON COMMUNICATIONS, INC.)	File No. BPH-911115M
)	
For Construction Permit for a)	
New FM Station on Channel 234A)	
in New Albany, Indiana)	

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MEMORANDUM OPINION & ORDER

Issued: June 15, 1993; Released: June 17, 1993

Background

1. This is a ruling on a Petition To Enlarge Issues that was filed by Martha J. Huber ("Huber") on May 17, 1993. An Opposition was filed by Rita Reyna Brent ("Brent") on June 2, 1993. Huber filed a reply pleading on June 11, 1993.

2. Huber seeks the addition of financial qualification and a related misrepresentation issue against Brent. Huber also seeks a notice of apparent liability of a forfeiture added against Brent.

Facts

3. Brent and her husband are financing her application. That fact is represented by Brent in her application Form 301. See Petition at Attachment 1. Brent responded to a Motion To Compel Production Of Documents and represented that she does not have any "financing documents" which are required to be produced under the standard document production. See Petition at Attachment 4 (Partial Opposition To Motion To Compel Production Of Documents). Brent also replied in her Partial Opposition that she was "not holding any documents not previously produced." In Huber's Motion To Compel Production Of Documents, Huber had sought the documents which were required to be on hand when an applicant self-finances. One document sought was a balance sheet or income statement.¹ Huber has interpreted Brent's responses to mean that Brent had no documents at all to support her financial certification.

¹ The Presiding Judge denied Huber's motion to compel because the term "financing documents" used for the standard document production [47 C.F.R. §1.325 (c) (1) (v)] does not include the self-financing documents required under Form 301. See Memorandum Opinion And Order, FCC 93M - 231 , released May 7, 1993.

4. Brent asserts in her Declaration dated May 26, 1993, which accompanies her Opposition, that:

At the time I prepared and signed my application, I had on hand a balance sheet current to within ninety days of the date of my signature. I also had on hand documents that showed yearly net income after Federal income tax for each of the past two years.

Brent represents in her Opposition that she never conceded that she had no Form 301 documents in existence when she certified. She only affirmatively represented that she had no "financing documents" under the standard production. Brent argues that Huber places "spin" on the words of Brent's counsel in counsel's intended denial of the existence of any "financing documents".²

Discussion

5. Huber correctly notes that Brent's application was filed in 1991, when the regulations for financial certifications had been amended to require contemporaneous documentation which would corroborate an affirmative certification. The Instructions to Form 301 require that an individual applicant who self-finances must also have on hand a detailed balance sheet and a statement showing the yearly net after-tax income received by the applicant from any source. Where other individuals are to provide funding, the applicant must have on hand a balance sheet or financial statement showing (1) all liabilities and current and liquid assets sufficient to meet current liabilities; (2) the financial ability to provide the requested funds; and (3) net after-tax income for the past two years. See Petition at Attachment 2 (Form 301 Instructions at p.6 [June 1989]). These are the materials that must be on hand so that an applicant, such as Ms. Brent, who is self-financing and who relies on another individual's financing, can determine a reasonable assurance.

6. The Commission requires that broadcast applicants certifying to their financial qualifications have reasonable assurance of sufficient net liquid assets on hand to construct and operate for three months without revenue. An applicant proposing to meet costs from personal resources must ascertain total outstanding commitments before certifying to a financial qualification. A.P. Walter, Jr., 6 F.C.C. Rcd 875, 877 (Review Bd 1991). The Commission has articulated the grounds for making this determination :

In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence

² As this Memorandum Opinion and Order is being written, Brent filed a Request For Leave To File Response. As noted below, the issues are added here as a result of the disclosure in the Declaration of Ms. Brent. There is no weight given to Huber's speculations about the scope of document review, the detail contained in the documents, or the wealth of the Brents. Nor has any adverse inference been drawn against Brent for not disclosing her Form 301 documents at the exchange of standard documents.

that, prior to certification, [she] engaged in serious and reasonable efforts to ascertain predictable construction and operation costs.

To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue"

Northampton Media Associates, 4 F.C.C. Rcd 5517, 5519 (Comm'n 1989). The 1991 Instructions to Form 301 delineated the documents that are necessary in order to be reasonably assured at certification that the necessary liquid assets are on hand so that the Northampton test can be met.

7. The standard document production does not require the disclosure of the 301 documents. See Footnote 1, supra. Therefore, until the Petition To Enlarge Issues was filed by Huber in response to which Brent filed her Opposition, it could not be determined whether Brent had the 301 documents on hand when she certified. It is disclosed in her Form 301 that she estimates her costs at \$180,000 and that the sources of the funding will be herself and her spouse. In her Opposition, Brent discloses that at the time of certification she had on hand a current balance sheet and documents showing yearly net income for two years. See Para 4, supra. But there is no identification of those documents as being joint financials which would reflect the combined liquid assets of Brent and her spouse. Nor is there any reference made to an estimate of the costs. Thus, it has become at least "fairly debatable" whether Brent had the reasonable assurance when she certified to accurate costs and sufficient liquid assets of both herself and her spouse. Frank Digesu, Sr., 7 F.C.C. Rcd 5459, 5461 n.5 (Comm'n 1992). The question can readily be met with a minimum of proof at hearing. Therefore, an appropriate issue will be added.

8. There is found to be raised a substantial question only concerning Brent's financial qualifications at certification and at the present. There is no substantial question raised as to whether Brent intentionally misrepresented her financial qualifications. And there would be no basis for adding a forfeiture issue based on the absence of evidence which may be obtained in discovery under the added financial issues. Therefore, Huber's request for added misrepresentation and forfeiture issues will be denied at this time. ³

Rulings

Accordingly, IT IS ORDERED that the Petition To Enlarge Issues filed by Martha J. Huber on May 17, 1993, IS GRANTED in part and IS DENIED in part.

³ As in an earlier ruling, the operative facts for adding the financial issues are based upon the Declaration of Ms. Brent and the disclosure of Brent in her Form 301. Cf. Memorandum Opinion and Order, FCC 93M-276, released May 18, 1993, at Para.7. Also, official notice may be taken of the information in the Form 301. Id.

IT IS FURTHER ORDERED that the following issues are added:

- A. To determine whether, at the time she filed her application, Rita Reyna Brent was financially qualified to construct and operate her proposed FM station at New Albany, Indiana.
- B. To determine whether, at the present time, Rita Reyna Brent is financially qualified to construct and operate her proposed FM station at New Albany, Indiana.
- C. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Rita Reyna Brent is qualified to receive a Commission permit to construct and operate her proposed FM station at New Albany, Indiana.

IT IS FURTHER ORDERED that the burden of proceeding and the burden of proof ARE ASSIGNED to Rita Reyna Brent.

IT IS FURTHER ORDERED that Rita Reyna Brent SHALL DELIVER to the offices of Huber's counsel within three business days of the release of this Order, copies of the documents referred to in her Declaration dated May 26, 1993, and copies of all other documents (if any exist) that were not previously produced but that were relied on by Rita Reyna Brent for financial certification.

IT IS FURTHER ORDERED that depositions MUST BE NOTICED within five business days of the release of this Order.^{4/5}

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel

Administrative Law Judge

⁴ It appears to the presiding Judge that depositions of principles have taken place. If that is the case, the parties may by agreement take the depositions of Ms. Brent and/or her husband via telephone. Any such telephonic deposition does not waive the right to an in-person deposition of the same witness if there is a showing of good cause. It is expected that the hearing date of August 10, 1993, will remain firm and that Ms. Brent can present evidence on the added issues immediately following her comparative case.

⁵ In order to accommodate the tight discovery schedule, counsel for Huber and counsel for Brent are being notified by telephone on the date of issuance that copies of this order are available for pick up at the Office of the Presiding Judge.