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June 21, 1993

RECEIVED

JUN 21 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an

CONSOLIDATED REPLIES TO OPPOSITIONS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.229 (d) and 1.294 (c) of the Commission's Rules, hereby submits its consolidated replies to the oppositions of David A. Ringer ("Ringer"), ASF Broadcasting Corp. ("ASF"), Shellee F. Davis ("Davis"), and Wilburn Industries, Inc. ("Wilburn"). On May 25, 1993, ORA filed separate motions to enlarge the issues against these applicants. The motions raised tower site availability issues against these applicants based on virtually identical facts and circumstances. The opposing applicants filed on June 9, 1993, separate oppositions which pleaded similar defenses to the motions to enlarge the issues. In support of its consolidated replies to the oppositions, ORA offers the following comments.

Ringer, ASF, Davis, and Wilburn exchanged copies of identical December 1991 tower site letters from Mid-Ohio Communications, Inc. The letters state in pertinent part that Mid-Ohio is "willing to negotiate" and has an "intent to negotiate" with Ringer, ASF, Davis, and Wilburn as to use of its transmitter tower and facilities. Moreover, "mutually acceptable terms" would be negotiated in the future. Within sixty (60) days of the date of the letter, the applicants were required to make a satisfactory showing to Mid-Ohio as to their financial qualifications.

Under long-established Commission policy, Ringer, ASF, Davis, and Wilburn do not have "reasonable assurance" of Mid-Ohio's tower site. National Communications Industries, 6 FCC Rcd 1978, 1979, para. 10 (Rev. Bd. 1991), aff'd, 7 FCC Rcd 1703, para. 2 (1992), "reasonable assurance" of the availability of a tower site requires more than a "willingness to deal" in the future on the part of the tower site owner.

In opposition to the motions to enlarge, Ringer, ASF, Davis, and Wilburn predictably claim that ORA took certain portions of the Mid-Ohio letter out of context and that the applicable case law supports a finding of "reasonable assurance." According to ASF, the portions of the Mid-Ohio letter cited by ORA do not rob the letter of what would otherwise be "reasonable assurance."

ASF inadvertently crystallizes the key issue raised by ORA. Statements in the letter, which would otherwise appear to give "reasonable assurance," that Mid-Ohio only has an intent to negotiate in the future do in fact rob the letter of "reasonable assurance." The wording of the Mid-Ohio letter is very clever and misleading. However, a careful reading of the letter shows that Mid-Ohio did no more than unilaterally propose some hypothetical lease terms and then indicate that nothing would be discussed or negotiated until after grant of a construction permit.

As held in National Communications Industries, a mere "willingness to deal" in the future by the tower site owner is insufficient. Although details may be negotiated in the future, the basic terms of a tower lease agreement must be negotiated at the time of certification in order to possess "reasonable assurance." Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332, para. 11 (1991), aff'd, FCC 93-263, released June 11, 1993.

In the case at hand, Mid-Ohio indicates in its letter that no negotiations have occurred and none would occur until after grant of the construction permit. The fact that the letter from Mid-Ohio to all the applicants is identical as to the terms of a possible lease shows that no individual negotiations as to each applicant have occurred and that Mid-Ohio only bandied around hypothetical terms it unilaterally proposed.

On June 21, 1993, ORA received from Davis, pursuant to discovery, a letter of June 7, 1993, from Carl B. Fry, counsel to Mid-Ohio, to Davis and to Ardeth Frizzell, a principal of ASF. See, attachment. The letter states in pertinent part that Ringer's counsel recently requested Fry to prepare a letter for submission to the Commission as to the meaning of the December 1991 tower site letters. Fry refused to adopt the language proposed by Ringer.

Accordingly, this shows that Ringer and Mid-Ohio have a difference of opinion as to the meaning of the December 1991 tower site letters. Thus, there was and remains no "meeting of the minds" between Mid-Ohio and Ringer and the

other applicants as to a tower site agreement. See, Genesee Communications, Inc., 3 FCC Rcd 3595, para. 4 (Rev. Bd. 1988), in order to possess "reasonable assurance," there must be a "meeting of the minds."

Ringer, ASF, Davis, and Wilburn try mightily to distinguish on the facts the cases cited by ORA in its motion to enlarge. However, they fail to comprehend that all cases are different as to the facts. What is decisionally significant is the principle of law or policy articulated in a case.

Ringer, ASF, Davis, and Wilburn argue that the applicable case law supports their position. However, their arguments are premised on the erroneous assumptions that they already have a negotiated agreement with Mid-Ohio and that ORA is contending that they must have a legally binding lease agreement. See, Ringer opposition, at pp. 4-5; ASF, at p. 1; Davis, at p. 5; and Wilburn, at pp. 2-3.

Since the filing of the oppositions of Ringer, ASF, Davis, and Wilburn on June 9, 1993, the Review Board released a decision which confirms that a mere willingness to discuss or negotiate a lease agreement in the future, absent a negotiated agreement as to basic terms at the time of certification, does not constitute "reasonable assurance." Global Information Technologies, Inc., FCC 93R-26, paras. 18-20, released June 17, 1993. Accordingly, there can be no serious dispute as to this principle of law or policy.

Davis suggests, at n. 1, p. 2, and n. 2, p. 4, that Mid-Ohio has no choice but to negotiate with the winner of the Westerville construction permit since there is no other viable use for the facilities of the now deleted Station WBBY-FM. Thus, presumably this fact would support a finding of "reasonable assurance." However, Mid-Ohio could just as easily remove and sell its broadcast equipment to another station and devote its real estate and studio building to another more productive commercial use.

Another just as plausible scenario as to Mid-Ohio's intentions is that it is attempting to use the possibility of a lease of its facilities as a means to

manipulate the Commission's selection process. According to the Mid-Ohio letter, each applicant must meet certain undefined financial qualifications standards to be able to even negotiate a tower site lease. Thus, Mid-Ohio, which is a disqualified and discredited former Commission licensee, has positioned itself to be able to dictate to the Commission as to which applicant will actually receive the construction permit and to effectively enter into a joint business venture with the new licensee.

As an example of the favoritism and potential mischief which Mid-Ohio could play with the Commission's selection process, it recently notified a principal of ASF, Ardeth Frizzell, who is a former employee of Mid-Ohio, that she was exempt from supplying financial information in early 1992 as to her qualifications to enter into tower site negotiations, although the other applicants were required to do so. See, affidavit of Carl Nourse, dated June 4, 1993, ASF opposition, attachment B. However, a letter from Mid-Ohio's counsel, Carl B. Fry, dated June 7, 1993, inexplicably indicates that this same ASF principal supplied satisfactory financial information to Mid-Ohio in early 1992. See, ASF opposition, attachment C. What's going on here?

Ringer and Davis claim that they complied with Mid-Ohio's requirement to supply financial information to it within sixty (60) days of the December 1991 tower site letter and that Mid-Ohio found their financial qualifications to be satisfactory. However, even meeting this requirement only entitles Ringer and Davis to enter into negotiations with Mid-Ohio after grant of a construction permit. See, Ringer opposition, June 7, 1993, letter from Carl B. Fry; Davis opposition, attachment D, letter of May 25, 1993, from Carl B. Fry, and attachment E, letter of June 7, 1993, from Carl B. Fry, which states in pertinent part that Mid-Ohio is willing to negotiate in the future if Ringer or Davis is awarded the construction permit and that this letter, along with the December 1991 letter, does not constitute a lease agreement. See also, the attached

letter of June 7, 1993 from Fry to Davis and Frizzell rejecting language proposed by Ringer.

Wilburn claims that it satisfied the requirement of Mid-Ohio to supply information as to its financial qualifications in early 1992. It submits a

Wilburn's opposition, it is now known that Mid-Ohio failed to acknowledge this letter, although acknowledging similar letters from ASF, Davis, and Ringer, and affirming their financial qualifications to enter into tower site negotiations. Accordingly, ORA's May 25, 1993, allegations that Wilburn failed to meet Mid-Ohio's requirements have been confirmed by Wilburn's opposition.

Even if the February 6, 1992, letter in question had undermined ORA's motion to enlarge, ORA would have until the filing of its reply to concede such fact. See, Section 1.294 (c). This would not prejudice either Wilburn or the integrity of the hearing process. An earlier response would only disrupt the established pleading cycle, especially in view of the fact that ORA's motion to enlarge made other allegations independent of the February 6, 1992, letter.

Ringer, at p. 8, paras. 12-13, challenges the legal sufficiency of ORA's current tower site agreement. According to Ringer, because the agreement is subject to "renegotiation" and because certain other terms are subject to "further negotiations," ORA does not have "reasonable assurance." However, Ringer mischaracterizes the language of the tower site agreement and also misapprehends applicable Commission case law.

What ORA's tower site agreement actually states is that the negotiated \$1,250 per month lease price may be "renegotiated" to take into consideration the market price at the time that a legally binding agreement is entered into. The agreement also states that the terms of the lease will be "further negotiated" as may be appropriate. See, Ringer opposition, attachments 293-294. These are normal provisions which have been found acceptable by the Commission. National Innovative Programming Network of the East Coast, 2 FCC Rcd 5641, 5643, para. 11 (1987), rent and other details may be negotiated in the future.

The fundamental and decisionally significant difference between ORA's tower site agreement and the supposed agreements of Ringer, ASF, Davis, and Wilburn, is that ORA actually negotiated the basic terms of its agreement, whereas Ringer, ASF, Davis, and Wilburn have yet to negotiate anything with Mid-Ohio! All that

Mid-Ohio has done is to send out a "teaser" letter which indicates a refusal to commence negotiations until after grant of the construction permit. However, Commission policy requires negotiations as to basic terms to be completed in order to possess "reasonable assurance." National Innovative Programming Network of the East Coast.

Ringer, at p. 7, para. 11, and n. 7, and ASF, at p. 2, observe that ORA relied upon the Mid-Ohio tower site and an identical letter when it filed its application in December 1991. Thus, they contend that ORA can not now attack the legal sufficiency of the Mid-Ohio letter.

Ringer and ASF raise frivolous arguments designed no doubt to divert attention from their own derelictions. ORA amended its application on March 9, 1992, the date for amendments of right, to specify a new tower site. Great Lakes Broadcasting, Inc., 4332, para. 10, aff'd, FCC 93-263, para. 5, released June 11, 1993, holds that where an applicant amends to a new tower site by the date for amendments of right any legal defect or other deficiency as to "reasonable assurance" in the original tower site is mooted. Thus, it is legally irrelevant as to whether or not ORA had "reasonable assurance" of the Mid-Ohio tower site when it originally filed. Under established Commission policy, this is now a moot point not subject to any inquiry.

ORA's motions to enlarge against Ringer, Davis, ASF, and Wilburn do not allege misrepresentation or "bad faith" by them in specifying the Mid-Ohio tower site. Rather, ORA is alleging that as a matter of law the Mid-Ohio tower site letter is defective, although superficially appearing to be in compliance with Commission policy.

Ringer and ASF fail to submit any evidence that, at the time of certification in December 1991, ORA realized that the Mid-Ohio letter was defective or that it certified in "bad faith." Simply because ORA challenged the Mid-Ohio tower site letter in May 1993, it does not logically follow that ORA realized in December 1991 that the letter was defective. Much can happen in that

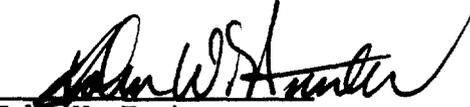
time interval. Indeed, the primary case relied upon by ORA, National Communications Industries, was not affirmed by the Commission until 1992.

If Ringer and ASF have any evidence that ORA realized at the time of certification that the Mid-Ohio letter was legally defective, they should have timely filed a motion to enlarge the issues, rather than make veiled threats (based on speculation) in footnotes to pleadings which have nothing to do with ORA's qualifications. Such tactics are themselves abusive of the Commission's processes.

WHEREFORE, in view of the foregoing, ORA requests that tower availability issues be specified against Ringer, ASF, Davis, and Wilburn. Moreover, in the case of Wilburn, a second independent basis exists to specify a tower site availability issue. Mid-Ohio has declined to find that Wilburn meets its qualifications to enter into negotiations, although purportedly making such a finding in favor of Ringer, ASF, and Davis. Accordingly, Wilburn will be unable to obtain its proposed tower site.

Respectfully submitted,

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June 21, 1993

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MEMORANDUM

via TELEFAX and U.S. MAIL

DATE: June 7, 1993
TO: Shelley Davis
Ardeth Frissell
FROM: Carl B. Fry, Esq. *CBF*
RE: Mid-Ohio Communications, Inc.
WBSY-FM
Lease of Assets
Revised Correspondence

Legal counsel for David Ringer telephoned me and requested that I prepare a letter similar to the one I prepared for each of you pursuant to your request

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 21st day of June, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Consolidated Replies to Oppositions" to the following:

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Administrative Law Judge
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*Hand Delivery