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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


June 21, 1993

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 original and six (6) copies of its "Reply to Opposition of WBC."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: John W. Hunter
John W. Hunter

By: Stephen T. Yelverton
Stephen T. Yelverton

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

| | | |
|---|---|---|
| In re Applications of: | ) | |
| | ) | |
| DAVID A. RINGER | ) | MM Docket No. 93-107 |
| | ) | |
| et al., | ) | File Nos. BPH-911230MA |
| | ) | |
| Applications for Construction | ) | through |
| Permit for a New FM Station, | ) | |
| Channel 280A, Westerville, | ) | BPH-911231MB |
| Ohio | ) | |

To: Administrative Law Judge
Walter C. Miller

**REPLY TO OPPOSITION OF WBC**

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____
John W. Hunter

By: _____

**REPLY TO OPPOSITION OF WBC**

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 this reply to the opposition of Westerville Broadcasting Company, Limited Partnership ("WBC"). ORA filed a motion to enlarge the issues against WBC on May 25, 1993. WBC filed

This category clearly refers to miscellaneous equipment, spare equipment, and equipment contingencies. It makes no reference to monthly operating costs, such as programming and personnel. Nor do the written cost estimates indicate that any equipment or other items were overestimated.

It is patently incredible that normal and regular monthly operating costs could be denominated as a "contingency," or as "unanticipated," or as a "spare," or even as a "miscellaneous" expense. There is nothing contingent or unanticipated about minimal monthly programming and personnel costs. What WBC and Freeman have attempted to do is to dishonestly explain a fatal omission in their cost estimates and then dishonestly present revised cost estimates as if they had been done in December 1991 at the time of certification.

However, WBC is bound by its written cost estimates at the time of certification and can not revise them without a showing of "good cause." Aspen FM, Inc., 6 FCC Rcd 1602, 1603, paras. 11-13 (1991). See also, KR Partners, 8 FCC Rcd 1748, 1749, para. 5, (MMB 1993), where the Mass Media Bureau rejected an amendment by an applicant which attempted to revise downward its construction costs and where the Bureau specified a financial issue.

WBC, at p. 5, contends that, based on Georgia Public Telecommunications Commission, 7 FCC Rcd 2942, 2948, para. 33 (Rev. Bd. 1992) and on Armando Garcia, 3 FCC Rcd 1065, 1066, para. 8 (Rev. Bd. 1988), it can rely on "bottom line" or overall estimates. However, its contentions are misplaced. Those cases dealt with oral cost estimates and with the issue of intentional deceit.

Here, WBC relied at certification on itemized written cost estimates which failed to include an itemization for monthly operational costs. WBC now attempts to revise its written cost estimates with new estimates which are at variance from the written cost estimates. Accordingly, Aspen FM, Inc. and KR Partners are controlling, not Georgia Public Telecommunications Commission or Armando Garcia. Moreover, WBC fails to note that Armando Garcia cited to Merrimack Valley Broadcasting, Inc., 82 FCC2d 165, 168, n. 5 (1980), which required at least a

general breakdown of expenses into categories for programming, sales, and administration.

In its opposition, at p. 3, WBC attempts diversionary tactics by hoisting "straw man" arguments which are irrelevant to the issue raised by ORA. WBC contends that its overall cost estimates are sufficient to include three months operating costs and that its overall cost estimates are larger than that of the other applicants. However, WBC misses the point. As the Review Board held in Gilbert Broadcasting Corp., 68 FCC2d 186, 43 RR2d 51, 75, para. 23 (Rev. Bd. 1978):

> Each applicant is required, among other things, to include within its application estimates it believes reflect the costs of implementing its particular proposal for operating the station ... These estimates can be expected to vary greatly among applicants depending upon how each applicant intends to operate the station. Thus, as correctly noted by Judge Naumowicz, each applicant must be evaluated on the basis of the costs of operation it has proposed and not on the basis of costs proposed by other applicants.

Accordingly, the fact that WBC has proposed more "bells" and "whistles" in its equipment list than the other applicants does not redeem its fatally flawed cost estimates. WBC's financial proposal must stand or fall on its own merits.

For whatever reason, WBC proposed at the time of certification to allocate almost all of its proposed cost estimates to equipment and to equipment related items, but none to programming and personnel or to other monthly operating costs. Perhaps, this was a "Freudian slip" by WBC signaling that it only intends to construct the station and then immediately sell it.

WBC, at pp. 3-4, attempts to distinguish various cases cited by ORA in its motion to enlarge. However, WBC fails to understand that all cases are different in their facts and circumstances. What is significant is the legal principle or policy articulated. WBC does not actually dispute that Commission policy requires applicants to estimate at the time of certification their first three months of operational costs. It failed to do this and now desperately flails away to avoid the inevitable consequence of its dereliction --- disqualification.

WHEREFORE, in view of the foregoing, ORA requests that financial qualifications issues be specified against WBC.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: _____
John W. Hunter

By: _____
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## 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 "Reply to Opposition of WBC" to the following:

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*Hand Delivery