

AUG 19 1993

Before the
Federal Communications Commission
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. <u>93-107</u>
)	
DAVID A. RINGER)	File No. BPH-911230MA
)	
ASF BROADCASTING CORP.)	File No. BPH-911230MB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
OHIO RADIO ASSOCIATES)	File No. BPH-911231MC

For Construction Permit for an
FM Station on Channel 280A in
Westerville, OH

To: Administrative Law Judge
Walter C. Miller

MOTION TO ENLARGE THE ISSUES AGAINST WILBURN INDUSTRIES, INC.

SUMMARY

This is a Motion to Enlarge Issues against Wilburn Industries, Inc. Based upon information uncovered during the course of discovery in this proceeding, it was discovered that Wilburn did not compile financial documentation of its financial qualifications at the time it filed its application, and further, did not budget for all items it will require to construct and operate its station. Therefore, the evidence indicates that Wilburn did not possess a valid "reasonable assurance" of the availability of funds at the time it filed its application, and the designation of a financial issue is being requested.

046

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RECEIVED

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To: Administrative Law Judge
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MOTION TO ENLARGE THE ISSUES AGAINST WILBURN INDUSTRIES, INC.

Shellee F. Davis ("Davis"), by her attorney, hereby requests that the issues be enlarged against Wilburn Industries, Inc. ("Wilburn") in this proceeding as follows:

To determine whether Wilburn Industries, Inc. was financially qualified at the time its application was filed, and if not, the effect thereof on its basic qualifications to be a Commission licensee.

With respect thereto, the following is stated:

Background

Wilburn's principals executed their application on December 27, 1991. See Attachment 1. Wilburn stated that its budget to construct and operate its station was "\$150,000," which it claimed would be satisfied in the amount of "\$75,000" each from its

principals Charles W. Wilburn and Bernard P. Wilburn. See Attachment 2.

The Standard Document Production Order required all parties to produce:

All bank letters and other financing documents with the dollar amounts unexpurgated

47 C.F.R. § 1.325(c)(1)(v). In response to the Standard Document Production Order on May 7, 1993, Wilburn initially asserted that it had no such documents, stating:

Applicant is not relying on any financing by a bank, other financial institution or third party.

Attachment 3.¹ When pressed, on May 28, 1993 Wilburn produced copies of two documents entitled "Statement of Financial Position" for the two sources on which it is relying for financing. The Statements were dated January 31, 1992, one month after the execution of its application. Attachment 4. Still later, on July 12, 1993, during depositions in this proceeding, it was discovered that still further documents had not been produced. As Charles Wilburn testified:

Q: Now, I was confused regarding whether a budget for operation of the station had been prepared prior to the application being filed. Had one been prepared by Wilburn Industries or you and Bernard?

A: Well, I -- yeah, I sort of prepared it in my head the first time I talked to Ms. Frizzell about it, about what it would take to operate the place, yes.

Q: Did you ever reduce that to writing?

A: Yes, we reduced it to writing.

Q: When did you reduce it to writing?

¹ Thus, no documents was produced (or has been produced) evidencing its principals' alleged intention to provide funding to Wilburn.

A: About a month later.

Q: After the --

A: Yeah, but it was the same as what I had budgeted in my head.

Q: Well, when you say the same --

A: Pretty much the same. I mean the figures did not vary.

Q: Let me continue on this budget. This budget that was reduced to writing, do you have that?

A: Not with me, but I have it, yes.

Q: Is it typewritten?

A: No, it is in my handwriting.

Q: Are there any other written materials that you have used to prepare that budget? In other words, as far as --

A: No, I don't think so.

Q: Mr. Wilson provided you certain information regarding the informational expenses of the radio station?

A: Uh-huh.

Q: Did any of the information Mr. Wilson provide you come in written form?

A: No, no, it was all verbal.

TR 48-49 (emphasis added) (Attachment 5, hereto). As he also testified:

Q: When you spoke with Ardeth Frizzell about this \$30,000 a month in expenses, did she ever give you any breakdown of the expenses?

A: No, she did not, but later I got a much clearer breakdown from a Terry Wilson, who had been a program director at the station.

Q: When you say "later," what do you mean?

A: Well, like about a year later.

TR 21 (emphasis added) (Attachment 5, hereto). A copy of the notes "Per Terry Wilson" are attached hereto as Attachment 6, and are dated "5/21." As Bernard Wilburn (one of the two principals who executed the financial certification) testified:

Q: Just so it is clear, neither you nor your father, to the best of your knowledge, wrote down any estimates of what it would cost to operate the radio station?

A: No, none. It was a pretty simple figure.

Q: To your knowledge has a written budget subsequently been prepared?

A: I think there is some notes.

* * *

Q: Do you know when the notes were created?

A: I think they were created in May.

Q: Of 1993?

A: Yes.

TR 34, 35 (Attachment 7, hereto).

For financing, Wilburn has budgeted payroll costs of \$30,000 per month, and additional operational costs (electric, telephone, postage, computers, "T&A", engineering, ASCAP/BMI, insurance, and lease for location and equipment) in the amount of \$16,000 per month. Attachment 6. For equipment, Wilburn is relying upon an lease (in the amount of \$6000 per month) from Mid-Ohio Communications, Inc. (the former licensee of Station WBBY, the station which vacated the frequency at issue in this proceeding), whereby Mid-Ohio has

agreed to lease the tower site (tower and building) located at State Route 37, Sunbury, Ohio; studio facilities located at 14 Dorchester Court, Westerville, Ohio; and "some or perhaps all of the equipment" listed on an inventory of equipment provided by Mid-Ohio. Attachment 8. Wilburn's budget does not include a provide to replace the "some or perhaps all" of the former WBBY equipment that will not be available, nor does the budget have any provision for attorney fees for prosecution of its application. See Attachment 6.

Argument

Under the Commission financial qualifications standard, an applicant must be financially qualified at the time its application is filed, or else its application is not acceptable for tender and is subject to dismissal. Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications, 7 FCC Rcd 5074, 5078 n.24 (1992). Pursuant to the requirements contained in the version of the FCC Form 301 adopted in 1989, an applicant:

must estimate the initial costs of constructing and operating the facility proposed in the application. The estimate for constructing the facility should include, but is not limited to, costs incurred for items listed below. In calculating costs for the items below, determine the costs for the items in place and ready for service, including amounts for labor, supervision, materials, supplies, and freight:

Antenna System...

RF Generating Equipment...

Monitoring and Test Equipment...

Program Origination Equipment...

Acquiring Land...

Acquiring, Remodeling or Constructing Buildings...

Services (including legal, engineering, and installation costs); and

Other Miscellaneous Items...

Attachment 9. Section III(C) of the Instructions states:

Documentation supporting the certification of financial qualifications need not be submitted with the application but must be available to the Commission upon request.

Attachment 9.

The Review Board stated in Las Americas Communications, Inc., 1 FCC Rcd 786, 788 ¶ 10 (Rev. Bd. 1986), that written documentation is the sine qua non for an applicant's financial qualifications. As the Commission stated in Northampton Media Associates, 4 FCC Rcd 5517 (1989), in overruling Las Americas:

Prior to 1981, the Commission required broadcast applicants to submit, with their applications, extensive written documentation supporting their financial qualifications, including "a detailed itemization of projected expenditures and sources of funds...a balance sheet, a statement of year income and assorted documentations." See, e.g., Revision of FCC Form 301, 30 RR 2d 381, 382 ¶ 6 (1981). Where an applicant was relying on individuals rather than financial institutions for funds, the applicant also had to demonstrate sufficient liquid assets to enable that individual to meet his financial commitment to the applicant. See Midwestern Broadcasting Co., 15 FCC 2d 720, 721-22 ¶ 5 & n.1 (1968). Thus, as the Board has observed, written documentation was at that time the sine qua non for financial qualifications. Las Americas Communications, Inc., 1 FCC Rcd 786, 788 ¶ 10 (Rev. Bd. 1986), applications for review pending. And, if a broadcast applicant failed to submit all of the required documentation, a financial issue was specified against that applicant.

Id. at 5518. Although the Commission departed for a time (from 1981-89) from a standard which required the contemporaneous preparation of financial documentation at the time the

application was initially executed, as the Commission observed in Northampton, that standard was reinstated in 1989:

As this proceeding acutely demonstrates, comparative hearings would be greatly simplified if all applicants had written documentation of their financial qualifications at the time of certification. Accordingly, the Commission adopted a Report and Order in General Docket No. 88-328 on March 30, 1989, which revised the FCC Form 301 to strengthen the financial certification requirements. Revision of Application for Construction Permit for Commercial Broadcast Station, 4 FCC Rcd 3853 (1989). There, the Commission retained the requirement that a broadcast applicant check whether or not it has "sufficient net resources on hand or... available from committed sources to construct and operate the requested facilities for three months without revenue." 4 FCC Rcd at 3859 ¶ 42. In order to ensure that applicants are correctly certifying their financial qualifications, however, the Commission revised its application form to require that applicants also submit costs estimates and identify each source of funds. Id. Under the revised form, a broadcast applicant need not submit the underlying documentation to verify its costs estimates, but it must actually have such documentation on hand when it submits its application. 4 FCC Rcd at 3859 ¶ 43.

Id. at 5519 ¶ 18.

Based upon this precedent, a financial issue is required against Wilburn for several reasons. First, by its own admission, Wilburn did not have a written budget at the time it filed its application, nor was there any document which evidenced the commitment of its principals to provide funding for the construction and initial operation of the station. This was in direct violation of the requirements of the current version of the FCC Form 301. Second, Wilburn's principals did not yet, at the time it filed its application, prepare balance sheets which could show whether its principals had sufficient funds to construct and operate its station for three months -- therefore, while each principal (both of whom executed the application) could validly certify in their application to their own financial status (but based, apparently, only upon their

recollection of items which would be contained on their balance sheet), they had no means to review their fellow stockholder's ability to meet their \$75,000 financial obligation. This also rendered Wilburn's financial certification a nullity. Thus, it was impossible for Wilburn to have has a valid "reasonable assurance" of the availability of financing at the time its application was filed. Finally, Wilburn's budget estimates operating costs, but fails in all respects to include an item specifically in its proposal for attorneys' fees, which was recently affirmed by the Court of Appeals to be a necessary financial item. See Weyburn Broadcasting Co. v. FCC, 71 R.R.2d 1386 (D.C. Cir. 1993). Additionally, Wilburn apparently is proceeding under the assumption that all equipment for the initial operation of the station can be simply leased from Mid-Ohio. However, the terms of the lease letter plainly state only that "some or perhaps all" of the equipment on the inventory list will be made available. See Attachment 8 (emphasis added). Nevertheless, Wilburn's budget includes no provision for the purchase of replacement equipment for the four equipment categories specified by the Commission in its FCC Form 301.²

The Commission has stated:

The test to be used regarding the nature of the showing required to reopen the question of the adequacy of the applicant's finances will be...limited to a showing of misrepresentation or gross omission of some decisionally significant item which would render the proposal decisionally defective.

Revised Processing of Broadcast Applicants, 72 F.C.C.2d 202, 222 (1979). Therefore, from the available evidence, it appears that Wilburn has indeed omitted "decisionally significant

² In contrast, although Davis is proposing to use the Mid-Ohio equipment, she has prepared a "worst case" budget which allows funds sufficient to purchase replacement equipment for the Mid-Ohio equipment, in the event the Mid-Ohio equipment becomes unavailable prior to the execution of a lease between Davis and Mid-Ohio, along with a \$50,000+ financial cushion.

items" from its budget, and consequently, was not financially qualified at the time it filed its application. These omissions on the part of Wilburn therefore also warrant the addition of an issue.

Conclusion

Discovery in this proceeding has revealed a score of shortcomings in Wilburn's financial qualifications. Accordingly, the requested financial issue is fully warranted.

Timeliness

The deposition of Wilburn's principals occurred on July 12, 1993, and a transcript of the deposition become available on August 10, 1993. This Motion is being filed within 15 days of the discovery of the new facts, and is therefore timely filed under Section 1.229(b) of the Commission's Rules.

Requested Documents

It is requested that Wilburn be ordered to abide by the Instructions and Definitions contained in the "Request for Production of Documents" submitted by Davis against Westerville Broadcasting Company Limited Partnership on June 26, 1993. All references to "WBC" or its principals should instead refer to "Wilburn Industries, Inc." or "Wilburn" or its principals, Bernard Wilburn and Charles Wilburn. Wilburn should be required to produce the following documents:

Request 1. Copies of all budgets and business plans (formal or informal) prepared with regard to the proposed construction and operation of Wilburn's original and currently proposed station and copies of notes, memoranda, letters, price lists or other information used in conjunction with the preparation of the budgets.

Request 2. Copies of all documents reflecting any assurance or commitment of funds, provision of funds, or agreements or understandings for the purchase of stock or proposed extensions of credit, from any source which Wilburn has relied upon at any time in conjunction with its application in this proceeding.

Request 3. Balance sheets or financial statements of any person or entity (except financial institutions or equipment manufacturers) Wilburn has relied upon at any time in support of its financial qualifications for its proposed station.

Request 4. Copies of all documents or notes reflecting any oral or written information (including business plans) provided by Wilburn to any person or entity (including proposed lenders or providers of credit) that Wilburn has (1) solicited, or (2) relied upon, to establish its eligibility for a loan or extension of credit for its proposed station, and any response or information Wilburn subsequently received in response to such solicitations.

Request 5. For each person or entity (other than financial institutions or equipment manufacturers) who at any time agreed to furnish funds, purchase stock, extend credit, or guarantee loans for Wilburn for its proposed station, (1) his balance sheets or financial statements covering the periods of time such agreement to furnish funds, purchase stock, extend credit, or guarantee loans was in effect; (2) all documents establishing his ability to furnish funds, purchase stock, extend credit, or guarantee loans (including copies of documents establishing the accuracy of the information provided on the balance sheets or financial statements, including copies of bank statements, stock certificates, promissory notes, and appraisals); and (3) all documents showing his net income after federal income tax for the two year period preceding such agreement to furnish funds, purchase stock, extend credit, or

guarantee loans to Wilburn, and for all periods during which the agreement or understanding was in effect.

Request 6. All documents withdrawing or revoking (or evidencing any withdrawal or revocation of) any oral or written understanding or agreement by any person or entity to provide funds or credit to Wilburn with respect to its proposed station.

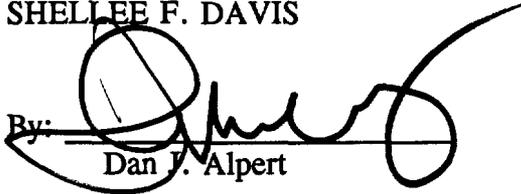
Request 7. Copies of all documents reflecting bills or retainer requests that have been issued to Wilburn in conjunction with its application but have remained unpaid.

Request 8. For each person or entity who already has supplied funds, purchased stock, extended credit, or guaranteed loans, a copy of the agreement (if any) obligating (or evidencing the willingness of) the person or entity to furnish funds, and documents evidencing the amounts furnished, the terms of repayment (if any), the rate of interest (if any), and security provided (if any).

WHEREFORE, it is respectfully requested that this Motion be granted, and that the issues be enlarged in this proceeding against Wilburn Industries, Inc., as requested.

Respectfully requested,

SHELLEE F. DAVIS

By: 

Dan J. Alpert

1250 Connecticut Ave.
7th Floor
Washington, DC 20036
(202) 637-9158

August 17, 1993

issue.

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Request 6. All documents withdrawing or revoking (or evidencing any withdrawal or revocation of) any oral or written understanding or agreement by any person or entity to provide funds or credit to Wilburn with respect to its proposed station.

Request 7. Copies of all documents reflecting bills or retainer requests that have been issued to Wilburn in conjunction with its application but have remained unpaid.

Request 8. For each person or entity who already has supplied funds, purchased stock, extended credit, or guaranteed loans, a copy of the agreement (if any) obligating (or evidencing the willingness of) the person or entity to furnish funds, and documents evidencing the amounts furnished, the terms of repayment (if any), the rate of interest (if any), and security provided (if any).

WHEREFORE, it is respectfully requested that this Motion be granted, and that the issues be enlarged in this proceeding against Wilburn Industries, Inc., as requested.

Respectfully requested,

SHELLEE F. DAVIS

1250 Connecticut Ave.
7th Floor
Washington, DC 20036
(202) 637-9158

By: _____
Dan J. Alpert

August 17, 1993

ATTACHMENT 1

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT.
U.S. CODE, TITLE 18, SECTION 1001.

I certify that the statements in this application are true and correct to the best of my knowledge and belief, and are made in good faith.

Name of Applicant <i>Wilburn Industries, Inc.</i>	Signature <i>Bernard P. Wilburn</i> <i>Bernard P. Wilburn, Vice President & Secretary</i>
Date <i>December 27, 1991</i>	Title <i>President and Treasurer</i>

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT
AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to determine if the benefit requested is consistent with the public interest. The staff, consisting variously of attorneys, analysts, engineers and applications examiners, will use the information to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the information is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be made to provide all necessary information. Your response is required to obtain the requested authority.

Public reporting burden for this collection of information is estimated to vary from 71 hours 45 minutes to 301 hours 30 minutes with an average of 118 hours 28 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, can be sent to the Federal Communications Commission, Office of Managing Director, Washington, D.C. 20554, and to the Office of Management and Budget, Paperwork Reduction Project (3060-0027), Washington, D.C. 20503.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552(a)(3), AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

ATTACHMENT 2

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. * SEE BELOW Yes No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. * SEE BELOW \$ 150,000.00
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Charles W. Wilburn 3324 Westbury Drive Columbus, Ohio 43221	(614) 451-4356	Shareholder Officer Director	\$ 75,000.00
Bernard P. Wilburn 1063 Pennsylvania Avenue Columbus, Ohio 43201	(614) 299-4790	Shareholder Officer Director	\$ 75,000.00
<p>* SEE EXHIBIT 2 ATTACHED, A COMMITMENT FROM MID-OHIO COMMUNICATIONS, INC., Present owner of WBBY, to lease All station facilities and equipment to Charles W. Wilburn, principal and shareholder in Applicant. It is Applicant's intention to lease said premises and facilities in the event the Commission grants a license to Applicant. The \$150,000.00 figure above represents the cost of operations of the station together with lease payments to Mid-Ohio Communications, Inc.</p>			

ATTACHMENT 3

LAW OFFICES
BROWN NIETERT & KAUFMAN, CHARTERED
SUITE 660
1920 N STREET, N.W.
WASHINGTON, D.C. 20036

TEL (202) 887-0600
FAX (202) 457-0126

- M E M O R A N D U M -

TO: All Counsel in MM Docket No. 93-107
FROM: Eric S. Kravetz
DATE: May 7, 1993
SUBJECT: Westerville, Ohio FM Proceeding
Standard Document Production

=====

Attached please find the following documents, which are being produced by Wilburn Industries, Inc. pursuant to Section 1.325(c)(1)(i) - (xii) of the Commission's Rules:

1. Articles of Incorporation of Wilburn Industries, Inc.
2. Amended Articles of Incorporation
3. By-Laws
4. Agreement of Shareholders
5. Letter to Charles W. Wilburn from Mid-Ohio Communications, Inc. (concerning applicant's proposed transmitter site)
6. Letter to legal counsel with initial retainer.
7. Retainer Agreement (monetary amounts redacted) for legal counsel.
8. Letter to Charles W. Wilburn from legal counsel regarding the publishing of a required public notice.

As reflected in the attached listing, there are no other documents falling within the categories listed in that Section.

esk:westerville:bj

PRODUCTION OF DOCUMENTS OF
WILBURN INDUSTRIES, INC.
PURSUANT TO STANDARD DOCUMENT PRODUCTION ORDER

1.325(c)(1)(i) Formation and organizational documents:

See Copy of Articles of Incorporation and Amendment thereto providing for voting and non-voting shares and Shareholders' Agreement attached hereto.

1.325(c)(1)(ii) Minutes of Meetings relating to application:

None

1.325(c)(1)(iii) Documents relating to purchasing interest in Applicant:

None; There are no rights or plans of persons or entities to purchase an interest in the applicant or of current owners to alienate their interests.

1.325(c)(1)(iv) Documents relating to encumbrances or Applicant:

None; There are no pledges, mortgages, security interests or encumbrances of any kind with respect to the applicant.

1.325(c)(1)(v) Bank letters and other Financing Documents:

None; Applicant is not relying on any financing by a bank, other financial institution or third party.

1.325(c)(1)(vi) Documents relating to Proposed Transmitter Site:

See copy of letter of intent to lease premises and assets of Mid-Ohio Communications, Inc. attached hereto.

1.325(c)(1)(vii) Documents relating to Communications by Proposed Principals Regarding their Participation in Station Management:

None

1.325(c)(1)(viii) Documents relating to Prior Integration Pledges:

None; parties have not previously applied for or owned a broadcast station.

1.325(c)(1)(ix) Documents relating to Communications between Principals of Applicant:

None

1.325(c)(1)(x) Documents relating to Enhancement Credits:

None

1.325(c)(1)(xi) Documents relating to Divestment of Media Interests:

None; Applicant has no Media Interests.

1.325(c)(1)(xii) Documents identifying Principals responsible for various listed activities of the Applicant.

There are no documents identifying principals who were responsible for the listed activities other than the letter of intent from Mid-Ohio Communications, Inc., a letter to counsel with an initial retainer, retainer agreement, and a letter from legal counsel regarding publication of a public notice.

esk:wilburn.pod:bj

ATTACHMENT 4