

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

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

For Construction Permit
For New FM Radio Station at
Westerville, Ohio

To: Administrative Law Judge
Walter C. Miller

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO
MOTION TO ENLARGE ISSUES

WILBURN INDUSTRIES, INC.

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September 3, 1993

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SUMMARY

In her Motion, Shellee F. Davis ("Davis") contends that a financial issue must be specified against Wilburn Industries, Inc. ("Wilburn") because Wilburn did not have all appropriate documentation in hand at the time its principals executed its FCC Form 301 application. For the most part, however, Davis' arguments are unreasonable, they misstate Commission policy, and they fail to advise the Judge of material evidence in Davis's possession. The sole "defect" actually found by Davis, that the Wilburns prepared their personal financial statements shortly after filing their application rather than at the time of filing, does not detract from the incontrovertible facts that Charles and Bernard Wilburn (a) reasonably ascertained the costs of constructing and operating their proposed station, and (b) executed their application only after they knew that they personally possessed the funds to meet such costs. Further, there has been no showing that the Wilburns failed to act in good faith, that the cost estimates set forth in their application are unreasonable, or that they do not have the personal financial resources to meet such costs. As pointed out in Davis's Motion, itself, where an applicant has acted in good faith, where it actually is financially qualified, and where it may have made only a minor technical misstep, further hearings are not required.

To the extent that Davis tries to buttress her arguments by claiming that Wilburn omitted material costs from its budget, such claims are entirely specious. Davis misreads both the letter from Carl Fry concerning the equipment which will be made available to Wilburn and the opinion of the U.S. District Court with regard to the budgeting of attorney fees.

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**OPPOSITION TO
MOTION TO ENLARGE ISSUES**

Wilburn Industries, Inc. ("Wilburn"), by its attorneys,
hereby submits its Opposition to the "Motion to Enlarge Issues"
filed by Shellee F. Davis ("Davis") on August 19, 1993, stating
in support thereof as follows:

Introduction

In her Motion, Davis contends that a financial issue must be
specified against Wilburn because Wilburn did not have all
appropriate documentation in hand at the time its principals
executed its FCC Form 301 application. As will be shown below,
however, Davis's arguments for the most part are unreasonable,
misstate Commission policy and fail to advise the Judge of

evidence in Davis's possession, while the remainder of its claims relate to matters which are of no decisional significance.

Wilburn's Financial Qualifications

The documents produced and deposition testimony provided by Wilburn in the course of discovery show that Wilburn's principals took a series of steps to assure themselves that they were financially qualified to construct and operate their proposed station before they executed and submitted their application to the Commission. Planning to file an application for a station to replace WBBY-FM, Charles Wilburn learned that all of the real estate, transmission and studio equipment, office space and furnishings, and everything else of significance which was used by that station in its operations would be available for lease from the prior licensee, Mid-Ohio Communications, Inc. ("Mid-Ohio"). (Attachment A, Tr. 23, 36.)¹ Mr. Wilburn therefore went to the office of Carl Fry, Mid-Ohio's representative, who issued Mr. Wilburn a letter assuring him that Mid-Ohio was willing to negotiate a lease with him which would make such real estate, equipment and other property available to Wilburn for \$6,000 per month. (Id.) Attached to the letter was a detailed multi-page inventory of the equipment and furniture owned and used by Mid-Ohio when it operated the station. (Davis Motion, Attachment 8.)

¹ For ease of reference and continuity, pertinent portions of Charles Wilburn's deposition testimony are appended hereto as Attachment A. Other documents attached to Davis's Motion and referenced herein have not been duplicated.

This letter of assurance was conditioned upon Wilburn providing a showing of its financial qualifications to Mid-Ohio within the following sixty days, i.e., by February 22, 1992. (Id.) Accordingly, Charles and Bernard Wilburn, who intend to personally finance their station, sent their personal financial statements, dated January 31, 1992, to Mr. Fry in early February of that year. (Attachment B.)

Charles Wilburn also met with Ardeth Frizzell, General Manager of WBBY-FM, who told him that it cost \$30,000 per month to operate WBBY-FM. (Attachment A, Tr. 17.) Although obtaining this figure was a reliable, pragmatic means of determining the money actually required to operate the facilities in question, Wilburn did not simply adopt it. He considered the payroll needed for the staff he had in mind, increased Ms. Frizzell's figures based on his own plans, factored in lease costs and other expenses such as utilities and music royalties, and reached a figure of \$50,000 per month, significantly higher than the figure provided by Ms. Frizzell. (Attachment A, Tr. 17, 21.)² He then drafted a memorandum to Bernard Wilburn outlining and explaining

² As Charles Wilburn testified at hearing, he has extensive experience in overseeing business operations as a legal guardian or fiduciary, in connection with the services he provides to the clients of his law firm. He also is a CPA and has represented businesses throughout his legal career. (Attachment A, Tr. 20.)

his estimates before Wilburn's application was filed with the Commission. (See Attachment C.)³

Once Charles and Bernard Wilburn were satisfied that they had reasonably ascertained what funds would be required (i.e., \$150,000) and knew that they personally possessed the funds to meet such costs, they each executed their FCC Form 301 application and filed it with the Commission. (Davis Motion, Attachment 1.) They proceeded without communications counsel, based on their understanding of the Form 301 and the Commission's rules, which they had reviewed. (Attachment A, Tr. 9-10.)⁴

³ Notably, this document was referenced in Mr. Wilburn's deposition and thereafter provided to counsel for Davis, but was not disclosed in Davis's Motion. (See Attachment A, Tr. 22.)

As reflected in his deposition, Charles Wilburn did not recall the date of this document at the time, and did not have it with him when he was questioned. (Attachment A, Tr. 47-49.) It later was provided to other counsel, along with other documents identified and requested in the course of his deposition. In this regard, and despite Davis's innuendo, this ongoing process of discovery is typical of the cooperative efforts in most comparative proceedings. Indeed, Davis herself initially exchanged documents on May 5, 1993, and then provided additional discoverable financial documents to the other parties on June 15, June 28 and (after they were identified and requested at her deposition) on August 2, 1993.

⁴ As cited at page 6 of Davis's Motion, the instructions to Section III of FCC Form 301 state that documentation supporting a financial certification need not be submitted with the application but must be made available to the Commission upon request. As recognized by the Commission in Northampton Media Associates, 4 FCC Rcd 5517 (1989), this language does not necessarily mean that documentation must be on hand at the time of certification; merely that an applicant must later be able to substantiate that it was qualified at such time. To the extent that Davis relies on other Form 301 instructions attached to its pleadings, those instructions indicate that they are provided for
(continued...)

Significantly, there has been no showing -- or even an allegation -- that the Wilburns failed to act in good faith, that the cost estimates set forth in their application are unreasonable, or that they do not have the personal financial resources to meet such costs.

The Davis Motion

Notwithstanding the above, Davis asserts that a financial issue must be specified against Wilburn, and that Wilburn ultimately must be found unqualified to be a Commission licensee, because its principals did not have certain documents in hand when they executed their application. Specifically, Davis alleges that an issue always is required unless an applicant's principals have at the time of execution: personal financial statements, a written budget, and written commitments by the principals to supply the promised funds.⁵ Davis argues, too,

form. Davis has not shown that the 1989 form included such instructions or that, if so, the Wilburns possessed and read such instructions at the time they completed and signed their application.

⁵ Davis states that financial statements also were required in this instance because each Wilburn principal had to prove to the other that he possessed the necessary financial wherewithal to meet his obligation when the application was signed. Davis cites no case and gives no reason why this would be necessary in the circumstances in this case, where both principals signed the application and where the two principals are a father and son who have shared the same business and income, and who are intimately familiar with each other's income, receivables and overall financial position. Moreover, Charles Wilburn had agreed to lend any necessary sums to his son, so that his signature alone would have sufficed, based upon his personal knowledge of his own financial position.

that the Wilburns failed to budget for attorney fees to be incurred in the prosecution of their application and to replace equipment which might not in fact be made available by Mid-Ohio.

Argument

These contentions by Davis are specious. As an initial matter, if a budget is necessary because the Commission wants to be sure that an applicant has ascertained what equipment is necessary, what such equipment will cost and what its other costs of operations are likely to be, there can be no question that Charles Wilburn undertook such an exercise, whether or not he then reduced such estimates to writing. The basic, underlying policy of the Commission, to preclude specious applicants, therefore is satisfied. Moreover, if contemporaneous documents identifying such costs (i.e., a "budget") must exist, Carl Fry's letter to Charles Wilburn and Charles Wilburn's written report to his son concerning their anticipated costs of operation plainly satisfy such a requirement. Davis's contention that an issue must be added ignores such documentation and therefore must be rejected.⁶

⁶ Even if, arguendo, such documents for some reason are not deemed to be a "budget", a finding to that effect would not undermine the basic fact which they demonstrate: Wilburn ascertained, evaluated and wrote down the construction and operating costs of his proposed facility before certifying that funds were available to meet such costs. To specify an issue in these circumstances would elevate form over substance.

Similarly, Charles and Bernard Wilburn timely provided personal financial statements to Carl Fry to establish their financial qualifications, and certainly would have drafted such documents one month earlier had they understood that the Commission required that such statements be drafted at that time. Those statements, moreover, establish that Wilburn's principals had the financial wherewithal to meet all of the costs to be incurred in connection with the construction and initial operations of their proposed station. Once again, if the policy of the Commission is to preclude spurious applicants, Wilburn's principals compiled the appropriate documents -- before being asked to supply such materials to the Commission or to other parties herein -- which demonstrate without question that they were fully qualified to become licensees at the time they filed their application. The fact that their personal financial statements were drafted shortly after filing their application rather than at the precise time of filing does not detract from that fundamental conclusion.

Finally, with regard to the documentation which Davis says is required to prove the Wilburns' willingness to make their funds available as represented in their application, Davis cites no case and provides no rational reason in support of her claim that Charles and Bernard Wilburn were required to draft a document "committing" themselves to providing the funds necessary to finance their proposed station. This is not a situation where

to finance their proposed station. This is not a situation where a bank or third party lender must provide assurances, or where multiple unrelated principals in an applicant must assure one another (and the one selected to execute their application) as well as the Commission of their intentions. Where both men are closely related in family, financial and daily business matters (and do not even rely on a written partnership agreement for their law practice),⁷ where each has set forth in their application the funds to be provided, and where each has certified his intention to provide such funds by personally executing their application -- no separate document is necessary. It makes as much sense to say that Davis had to execute such a document, herself.

In sum, the Commission has found, through hard experience, that not all applicants have undertaken a serious, good faith effort to ascertain the costs of the facility they desire and to further establish that they can meet those costs. Procedures therefore have been designed to ensure that applicants undertake the necessary steps and then be able to prove that they did so. Where such procedures were not followed, or where an applicant cannot document that it did what was required, then financial issues may be added and such applicants may be disqualified. In this case, however, there can be no good faith doubt that: (1)

⁷ See deposition testimony of Bernard Wilburn, Attachment D, Tr. 52.

and (2) have provided reasonably contemporaneous documentation of such activities. The only real "defect" may be that the financial statements showing that the Wilburns can meet their costs were prepared 30 days "too late." There is no doubt, however, that their overall cost estimates are both reasonable and well-founded and that they do have the funds to meet their projected expenses.

In these circumstances, it must be concluded that the Wilburns are in fact financially qualified. The only inquiry would be to determine if and to what extent they may have failed to completely satisfy a technicality which raises no question about the timeliness or accuracy of their actual cost estimates or ability to meet their estimated costs. In such cases -- and as pointed out by Davis at page 8 of her Motion -- the Commission does not waste its time examining such immaterial missteps.

Rather,

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 FCC 2d 202, 222 (1979). Having correctly cited the applicable standard, the Motion filed by Davis sadly fails to meet this test.

In this regard, while Davis recognizes the weakness of her arguments and thus seeks to buttress them by alleging that Wilburn could not reasonably rely on Carl Fry's letter, her argument is, at best, frivolous. According to Davis, Fry's letter recited that Mid-Ohio would lease the equipment itemized on the attached pages, but warned that such equipment in fact might not be available. Davis therefore concludes that Fry's offer to lease cannot be relied upon.

Davis, however, misreads the plain language of the letter. Thus, Fry stated, without reservation or limitation, that,

The real estate lease and equipment lease...would include the use of the tower site (tower and building) located at State Route 37, Sunbury, Ohio 43074; studio facilities located at 14 Dorchester Court, Westerville, Ohio 43081; and equipment utilized in the operation of the station.

Fry then stated that,

The equipment ["utilized in the operation of the station"] would include some or perhaps all of the equipment itemized in the inventory accompanying this correspondence.

That is, Fry did not thereby negate his preceding statement that the equipment used by WBBY-FM would be available under the lease; he merely made no representation about the completeness of the inventory list. Nothing in his letter indicates that the equipment, listed or not, might not be available. Moreover, Wilburn certainly knew that, listed or not, all the equipment offered for lease was sufficient to operate WBBY-FM, because WBBY-FM in fact had operated using such equipment.

Davis contends, too, that Wilburn's budget was fatally deficient because no funds to pay attorney fees were included. Wilburn, however, did not need to list attorney fees in its initial budget, because it had not retained counsel and had made no decision to do so. When it later retained counsel (because of its decision to perfect and prosecute its application after its principals examined the other applications which were filed), it then satisfied all legal fees on an ongoing, current basis. In such circumstances, the fact that its budget did not list attorneys fees raises no question about its financial qualifications. Port Huron Family Radio, 5 FCC Rcd. 4562 (1990); Munci Broadcasting 54 RR 2d 42 (1983).⁸

Conclusion

The Motion filed by Davis simply does not contain a reasoned, supported explanation of why further hearings under a Wilburn financial issue are required in this case. At worst, Wilburn perhaps did not understand and fulfill one or two of the detailed steps called for by Commission policy, but in no event did any such misstep relate to the fundamental question of

⁸ Davis cites Weyburn Broadcasting Co v. FCC, 71 RR 2d 1386 (D.C. Cir. 1993), in support of its claim that legal fees must be included in a budget even if they are paid on a current basis. Davis, however, simply misreads the case: The Court there held that a financial issue was required because, inter alia, counsel had withdrawn from the case due to nonpayment of fees. 71 RR 2d at 1391. Indeed, the Court distinguished that case from those where fees had been paid. Id. at n.1.

whether Wilburn's principals: (a) ascertained the costs they expected to incur, (b) reasonably concluded that they had the funds to meet such costs, and (c) are in fact qualified from a financial standpoint. There was no misrepresentation, no "gross omission of some decisionally significant item" and there thus is no reason to "reopen the question of the adequacy of the applicant's finances." Revised Processing of Broadcast Applicants, supra. Accordingly, the Motion to Enlarge Issues filed by Davis should be denied.⁹

Respectfully submitted

WILBURN INDUSTRIES, INC.

By:


Eric S. Kravetz
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Suite 660
Washington, D.C. 20036
(202) 887-0600

Its Attorneys

Dated: September 3, 1993

⁹ The instant pleading is being submitted one day out of time due to illness of counsel. Acceptance for this reason therefore is respectfully requested. Counsel for Davis has advised that he will not object to this request.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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IN RE APPLICATIONS OF: :
:MM Docket No.: 93-107
DAVID A. RINGER : BPH 911230MA
ASF BROADCASTING CORP. : BPH 911230MB
WILBURN INDUSTRIES, INC. : BPH 911230MC
KYONG JA MATCHAK : BPH 911230MF
SHELLEE F. DAVIS : BPH 911231MA
WESTERVILLE BROADCASTING CO.
LIMITED PARTNERSHIP : BPH 911231MB
OHIO RADIO ASSOCIATES, INC. : BPH 911231MC
:
For Construction Permit for :
an FM Station on Channel :
280A in Westerville, Ohio :

Washington, D.C.
Monday, July 12, 1993

Deposition of:

CHARLES W. WILBURN

called for oral examination by counsel for the
Applicant ASF Broadcasting, pursuant to notice, at the
offices of Brown, Nietert & Kaufman, Chartered, 1920 N
Street, Northwest, Suite 660, Washington, D.C., before
Shari R. Broussard, a Notary Public in and for the
District of Columbia, beginning at 9:55 a.m., when
were present on behalf of the respective parties:

1 think it was, of 1991.

2 Q At the time you filed the initial
3 application did you have communications' counsel?

4 A No.

5 Q When did you retain counsel?

6 A After we filed the applications and I
7 think it was the mid -- early to mid January.

8 Q And that counsel was Mr. Kravetz?

9 A That's correct.

10 Q How did you find Mr. Kravetz?

11 MR. KRAVETZ: Go off the record for just
12 one second.

13 (Brief interruption.)

14 (Mr. Yelverton entered his appearance.)

15 BY MR. KOERNER:

16 Q Mr. Wilburn, before we went off the record
17 I think my question was how did you find Mr. Kravetz.

18 A He was recommended to us by John McKinley,
19 who was an engineer, had been, for WBBY, and whom we
20 had contacted. And he recommended Mr. Kravetz to us.

21 Q Did he recommend Mr. Kravetz himself or
22 did he recommend the law firm?

1 A Mr. Kravetz personally.

2 Q When you prepared the application, the
3 initial application that was filed in this proceeding,
4 did you have any assistance in completing the forms?

5 A No, Bernard and I just filled out the
6 blanks together.

7 Q How did you acquire the form?

8 A I don't remember whether we asked the FCC
9 to send it or what. I really don't remember.

10 Q How about the engineering portion of the
11 application?

12 A That was obtained from the public files of
13 WBBY.

14 Q From the station itself?

15 A Yes, uh-huh.

16 Q The application was later amended, was it
17 not?

18 A Yes, twice I think.

19 Q One of those amendments was a
20 re-arrangement, if you will, of the structure of the
21 corporation?

22 A That's correct.

1 A Only from Ardeth Frizzell, who told me
2 when I spoke with her before I filed the application
3 that the costs of running it were about 30,000 a month
4 and at later time she said they were grossing about
5 40,000 a month. So I would assume from that they were
6 netting about 10,000.

7 Now, that would be the actual operations.
8 I am sure if they counted their legal expenses, it
9 would throw it into a large loss, but I don't know
10 what you want to include in those expenses.

11 Q You would anticipate, however, that those
12 numbers, at least from an operational standpoint,
13 would probably continue?

14 A I think they would be much better. Should
15 be much better.

16 Q Do you have board of directors?

17 A Of Wilburn Industries?

18 Q Yes. Besides you?

19 A No.

20 Q Do you intend to withdraw from the
21 practice of law?

22 A Yes. I intend to withdraw from the

1 the beginning. I don't think it would be wise.

2 Q Do you have independent income sources?

3 A I have some and so does my wife.

4 Q Have you ever run a business aside from
5 the law firm?

6 A Run a business?

7 Q Yes.

8 A Well, I have dealt in real estate quite a
9 bit and I have represented many, many clients who run
10 businesses. So --

11 Q No, I mean you personally.

12 A But as far as having an equity interest,
13 no.

14 Q Have you ever held a managerial position
15 other than the law --

16 A I'm sorry?

17 Q Have you ever held a managerial position
18 other than in the law firm?

19 A No. Before I went to law school I became
20 a certified public accountant. I still am that and I
21 work^{ed} for the firm of Ernst & Ernst, which is now Ernst
22 & Young, I believe. That would be the closest to

1 managerial in the case of managing clients' accounts
2 and the like.

3 Q When you were preparing the application
4 and, in particular, the financial portion of it, on
5 what did you base your estimates?

6 A Well, as I mentioned previously, my
7 initial information came from Ardeth Frizzell, who
8 told me that at the time that the notice of taking the
9 license really came down they were spending about
10 30,000 a month in expenses. And that is the initial
11 information I came off of. And I upgraded that to
12 what I felt it should be and then determined what
13 three months' operating cost would be.

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

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

20 Q When you say "later," what does that mean?

21 A Well, like about a year later.

22 Q Did Ardeth Frizzell indicate when you

1 spoke to her how many employees the station had?

2 A I think she said they had 18.

3 Q And did she give you any breakdown of
4 their positions?

5 A Yeah, I think we discussed that.

6 Q Did you get this information from her
7 verbally or --

8 A From her verbally, right. I went to the
9 station and visited her.

10 Q And from that you figured out a budget?

11 A Yes.

12 Q And was that budget in writing?

13 A Well, you -- did we put it in writing?

14 Q Yes. Did you write it down?

15 A Well, when I spoke with -- yes, I did
16 initially, but then I got much more specific after I
17 spoke with Mr. Wilson some months ago about it. Yeah,
18 I got it in writing. Not with me, but, I have got it.
19 I could tell you approximately, I think, what I
20 included.

21 Q With respect to other matters, the cost of
22 establishing the facility, did you get that from

1 Ardeth Frizzell also?

2 A Well, she told me that the previous owners
3 had offered the proposition of leasing all the
4 facilities to whoever acquired the license and she
5 gave me the attorney's name. And I think she may have
6 even called them for me and said that I would be
7 coming down to get a committal letter. And I followed
8 through on that and got a letter from Carl Fry, the
9 attorney of the previous owner. And that is a
10 commitment to lease the facilities for 6,000 a month
11 for three years.

12 Q Is it your understanding that all that is
13 required to put the station on the air is to make the
14 first month's payment?

15 A No, there has to be a lease negotiated and
16 I don't know how much they are going to require as a
17 down payment, whether it be one month or three months
18 or what it is.

19 Q What did you budget for?

20 A In my budget I included at least 6,000 a
21 month.

22 Q Did you include any down payment?

1 the former WBBY licensee?

2 A I went to his office and the letter had
3 been prepared and it was delivered to me at the
4 office. I don't believe he personally delivered that.
5 I have spoken with him two or three times.

6 Q I wanted to ask you about the process that
7 led to the creation of that letter.

8 A Okay.

9 Q Who made the initial contact with Mr. Fry
10 on behalf of Wilburn Industries?

11 A I don't remember whether I made the call
12 from the office of WBBY or whether Ardeth Frizzell
13 made it, but she was the one who told me that those
14 facilities were being offered and told me the name of
15 the attorney that would provide me with the offer.
16 And I don't remember whether she made the call or
17 whether I made the call, but it was made from the
18 office of WBBY. And I went to that office of Carl Fry
19 the same day, I think it was December 24, and picked
20 up that letter.

21 Q And then you had subsequent telephone
22 conversations with Mr. Fry; is that correct?

1 Q I understand that. Just above the
2 signatures of you and Bernard there is --

3 A We printed our name.

4 Q -- printed -- did you print your name?

5 A Yes, and Bernard printed his own.

6 Q Fine. And there is a date which says
7 December 27th, 1991. Is that --

8 A Actually they both look like my writing.

9 Q They are both your writing?

10 A Yes, they both look like my writing. The
11 printing is each of ours.

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

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

20 Q Did you ever reduce that to writing?

21 A Yes, we reduced it to writing.

22 Q When did you reduce it to writing?