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September 17, 1993

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SEP 17 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

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

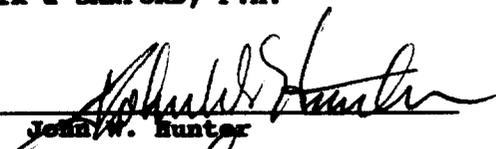
Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Reply to Opposition of ASF."

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

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:   
John W. Hunter

By:   
Stephen E. Yelverton

Enclosure

B:CATON.108

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of: )  
 )  
DAVID A. RINGER )  
 )  
 et al., )  
 )  
Applications for Construction )  
Permit for a New FM Station, )  
Channel 280A, Westerville, )  
Ohio )  
  
To: Administrative Law Judge  
Walter C. Miller

MM Docket No. 93-107  
File Nos. BPH-911230MA  
through  
BPH-911231MB

REPLY TO OPPOSITION OF ASF

Respectfully submitted,  
MCNAIR & SANFORD, P.A.

By: \_\_\_\_\_  
John W. Hunter

By: \_\_\_\_\_  
Stephen T. Yelverton  
Attorneys for Ohio Radio  
Associates, Inc.  
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Washington, D.C. 20005  
Telephone: (202) 659-3900

September 17, 1993

B:CATON.108

REPLY TO OPPOSITION OF ASF

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.229 (d) and 1.294 (c)(1) of the Commission's Rules, hereby submits this reply to opposition. On August 20, 1993, ORA filed a motion to enlarge the issues against ASF Broadcasting Corporation ("ASF"). On September 7, 1993, ASF filed an opposition thereto. In reply to the opposition, ORA submits the following comments.

As noted in ORA's motion to enlarge the issues, ASF proposes to operate its station by leasing the existing facilities of defunct Station WBBY-FM. That station operated at 3kw with an omnidirectional transmitter. In an amendment to its application, filed March 5, 1992, ASF proposes to operate at 5kw with a directional antenna (Dep. Tr. 74). However, Ardeth Frizzell, ASF's purported voting shareholder who prepared its application, never considered the cost of a directional antenna in determining cost estimates for ASF and she does not know how much such an antenna would cost (Dep. Tr. 75).

Moreover, at the time of certification, Frizzell prepared no written budget or cost estimates (Dep. Tr. 72). A written budget prepared sometime after certification contains no reference to a directional antenna (Dep. Tr. 76).

ASF proposes to provide auxiliary power at both the studio and tower site (ASF Hearing Ex. 4). However, Frizzell did not include costs for auxiliary power in any estimates or budgets for ASF. She does not know if auxiliary power generators will be provided in the lease of the Station WBBY-FM facilities (Dep. Tr. 77).

ASF stated in its application, filed on December 30, 1991, that its cost estimates were \$90,000 (Dep. Tr. 31). Pursuant to a shareholders agreement, dated December 23, 1991, Section 3, pp. 3-4, the \$90,000 amount is to be funded solely by a loan, which is limited to \$100,000, from Thomas J. Beauvais, a purported non-voting shareholder. See, attachment 1.

In opposition to the motion to enlarge the issues, ASF submits a declaration of Frizzell, dated September 7, 1993. Therein, Frizzell concedes that she did not know the cost of a directional antenna or of auxiliary power generators, but only knew that these items could be purchased or leased.

However, Commission policy requires that an applicant know more than the fact that an item can be purchased or leased somewhere at some price. An applicant is required to seriously and meaningfully ascertain its proposed cost estimates. Armando Garcia, 3 FCC Rcd 1065, para. 15 (Rev. Bd. 1988). A vague "general sense" of costs is insufficient. Victorson Group, Inc., 6 FCC Rcd 1697, 1700, para. 19 (Rev. Bd. 1991). Accordingly, the specification of a financial qualifications issue is required on this basis alone.

ASF claims, in its opposition, that it has over \$200,000 available to fund the construction and first three months operation of the proposed station. It therefore contends that it could meet any shortfall in the \$90,000 cost estimates to cover the cost of a directional antenna and auxiliary power generators.

However, ASF ignores a shareholders agreement, dated December 23, 1991, Section 3, pp. 3-4, which states that the \$90,000 amount for construction and first three months operation is to be funded solely by a loan, which is limited to \$100,000, from Thomas J. Beauvais, a purported non-voting shareholder. See, attachment 1. Thus, ASF does not have \$200,000 available for construction and the first three months of operation. Rather, the shareholders have agreed that only \$100,000 will be available for this purpose.

ASF claims, in its opposition, that Beauvais has now agreed to fund the acquisition of a directional antenna and auxiliary power generators. This is based upon his declaration, dated September 7, 1993. However, Beauvais' declaration constitutes a revised financial plan which can not be considered unless accompanied by an amendment to ASF's application and a showing of "good cause" for its acceptance. Aspen FM, Inc., 6 FCC Rcd 1602, 1603, paras. 11-13 (1991).

ASF contends, in its opposition, that it is presently financially qualified. However, under Commission policy, it is legally irrelevant that an applicant is presently financially qualified if it was not qualified at the time of certification, or at the time for amendments of right. Aspen FM, Inc. It has

now been demonstrated that ASF was not financially qualified at the time of certification, or at the time for amendments of right.

ASF claims, in its opposition, that Frizzell actually did prepare a written budget at the time of certification of the application in December 1991. However, that assertion is belied by Frizzell's own deposition testimony. Therein, she admitted that ASF's budget was not in writing, that she "figured in her head" how much it would cost to operate the station for three months, and put these numbers on some paper which had been thrown away (Dep. Tr. 72). Although she was then shown a document with a caption "Cost of Operations for First 90 Days," that document is undated and there is no reliable evidence as to whether it was prepared prior to or at the time of certification. See, attachment 2.

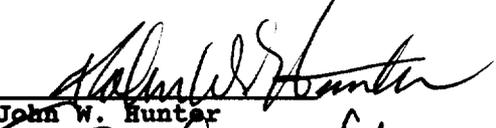
Accordingly, a substantial and material question of fact is raised as to whether ASF had written cost estimates at the time of certification. At best, Frizzell's deposition testimony is contradictory and the cost estimates produced by ASF are undated.

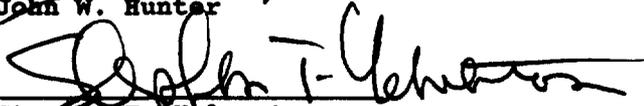
Commission policy requires that an applicant prepare at the time of certification written documentation showing cost estimates for construction and the first three months of operation. See, Revision of FCC Form 301, 50 RR2d 381, 382 (1981); FCC Form 301 Instructions (1989-1992 version), Section III (D)(1)(b), pages 5-6; Revision of FCC Form 301, 4 FCC Rcd 3853, 3859-3860, paras. 43, 46, 49, 52 (1989); Las Americas Communications, Inc., 1 FCC Rcd 786, 788, para. 10 (Rev. Bd 1986), written documentation is the sine qua non for financial qualifications; Northampton Media Associates, 4 FCC Rcd 5517, 5519, paras. 18-19 (1989), all applications filed on or after June 26, 1989, must have written documentation of their financial qualifications prepared at the time of certification. However, even if Frizzell did actually prepare written cost estimates at the time of certification, the specification of financial qualifications issues is nevertheless required based upon other deficiencies in the ASF financial plan, as noted in ORA's motion and elsewhere in this reply pleading.

WHEREFORE, in view of the foregoing, ORA requests that financial qualifications issues be specified against ASF based upon patently defective cost estimates and an inadequacy of committed funds at the time of amendments of right.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:   
John W. Hunter

By:   
Stephen T. Yelverton  
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September 17, 1993

020979.00001 ORA.916

**SHAREHOLDERS AGREEMENT**

THIS SHAREHOLDERS AGREEMENT is entered into on December 23, 1991, among the following parties (hereinafter collectively referred to as the "Parties"): ARDETH S. FRIZZELL (hereinafter referred to as "ASF") and THOMAS J. BEAUVAIS (hereinafter referred to as "TJB").

**WHEREAS:**

A. ASF and TJB constitute all of the shareholders as ASF BROADCASTING CORPORATION, an Ohio Corporation (hereinafter referred to as the "Company"). ASF is the holder of Two Hundred and Fifty (250) shares of Voting Common stock of the Company and TJB is the holder of Seven Hundred and Fifty (750) shares of Non-Voting Common Stock of the Company; and

B. No other shares of stock of the Company have been authorized, issued or are outstanding; and

C. The Company desires and intends to submit an application to the Federal Communications Commission for the issuance of a license to operate an FM radio service to serve Westerville, Ohio; and

D. By this Agreement, the parties intend to establish and set forth further understandings between them concerning future capital contributions and loans by the shareholders to the Company, voting rights, management, and ASF'S option to purchase in accordance with the provisions hereinafter set forth;

NOW THEREFORE, it is agreed as follows:

1. Governing Law. This Agreement and the Corporation subject to this Agreement shall be governed under and in accordance with Ohio Revised Code Section

	<u>Capital Stock</u> <u>\$1.00 Par Value</u>	<u>Additional Paid</u> <u>in Capital</u>
250 Voting Common	\$250.00	\$1,750.00
750 Non-voting Common	\$750.00	\$5,250.00

**PRIOR TO GRANT OF CONSTRUCTION PERMIT**

In addition to the Additional Paid In Capital referred to hereinabove, ASF and TJB agree to provide further Additional Paid In Capital in the same proportion as their respective Capital Stock Accounts up to Forty Thousand (\$40,000) Dollars total. In addition to the above, TJB further agrees to provide Additional Paid In Capital up to Sixty Thousand (\$60,000) Dollars. The Additional Paid In Capital, first from ASF and TJB jointly, and after, by TJB, are to be paid to the Company within thirty (30) days after receipt of a request for said Additional Paid In Capital from the President of the Company. The proceeds thereof shall be used for the following purposes only:

Legal, engineering, or other reasonable expenses related to the Company's application to the Federal Communications Commission for the issuance of a license to operate an FM radio service to serve Westerville, Ohio on Channel 280.

**AFTER GRANT OF CONSTRUCTION PERMIT**

After issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280, and upon which no further appeals can be taken, TJB agrees to loan to the Company additional amounts, up to One Hundred Thousand (\$100,000) Dollars, on a first secured basis at an interest rate of prime plus three (3%) percent (prime to be determined by the then current published rate of Bank One of Columbus, N.A.)

with maturity of five (5) to seven (7) years and with interest and principal payment provisions to be determined at the time the loan(s) is (are) closed. The loan proceeds shall be used for the following purposes only:

(a) Lease costs necessary for leasing of the Company's radio broadcast facility in or near Westerville, Ohio after issuance of the Federal Communications Commission of a construction permit to the Company for FM radio service licensed to Westerville, Ohio on Channel 280.

(b) Three (3) month's additional working capital as required by the Federal Communications Commission license application.

4. Option to Purchase. ASF shall have an option to purchase all of TJB's Capital Stock (consisting of Seven Hundred Fifty (750) shares of Non-Voting Common Stock) on the following terms and conditions, provided however, that all outstanding loans from TJB to the Company are paid in full prior to exercise of the option.

(a) Payment. In cash at closing.

(b) Option Time Period. Any time during the first three (3) years after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken. This option may be exercised by written notice as provided herein.

(c) Option Price. During the first year after issuance of a Construction Permit authorizing the Company to operate an FM radio service for Westerville, Ohio on Channel 280 and upon which no further appeals can be taken, the option price shall be five (5) times to the total of TJB'S Capital Stock and Additional Paid In Capital accounts. During the second year

**ASF BROADCASTING CORPORATION**

**COST OF OPERATIONS FOR FIRST 90 DAYS**

**PROJECTION:**

<b>Personnel</b>	<b>\$57,000</b>
<b>Travel &amp; Entertainment</b>	<b>600</b>
<b>Advertising/Promotion</b>	<b>600</b>
<b>Repair and Maintenance</b>	<b>1,000</b>
<b>Supplies</b>	<b>600</b>
<b>Utilities</b>	<b>1,500</b>
<b>Freight/Postage</b>	<b>650</b>
<b>Insurance</b>	<b>1,000</b>
<b>Rents/Leases</b>	
<b>Equipment/Studio/Offices</b>	<b>18,000</b>
<b>Taxes</b>	<b>600</b>
<b>Professional Services</b>	<b>500</b>
<b>Dues and Subscriptions</b>	<b>450</b>
<b>Programming</b>	<b>5,250</b>
<b>Royalties</b>	<b>750</b>
<b>Miscellaneous</b>	<b><u>1,500</u></b>
<b>TOTAL COST OF OPERATIONS (90 Days)</b>	<b>\$90,000</b>

**CERTIFICATE OF SERVICE**

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 17th day of September, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of ASF" to the following:

The Honorable Walter C. Miller\*  
Administrative Law Judge  
Federal Communications Commission  
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2000 L Street, N.W.  
Washington, D.C. 20554

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Counsel for Shellee F. Davis

  
Stephen T. Yelverton

\*Hand Delivery