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

In re Applications of	)	MM Docket No. 92-316
	)	
RIVERTOWN COMMUNICATIONS COMPANY INC.	)	File No. BPH-911008ME
	)	
SAMPLE BROADCASTING COMPANY, L.P.	)	File No. BPH-911010ME
	)	
For Construction Permits For a New FM Station on Channel 282C3 at Eldon, Iowa	)	

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TO: Administrative Law Judge
John M. Frysiak

REPLY TO "OPPOSITION TO MOTION TO ENLARGE ISSUES"

Rivertown Communications Company, Inc, by its attorney, hereby replies to the "Opposition to Motion to Enlarge Issues" filed herein by Sample Broadcasting Company, L.P. ("Sample") on October 18, 1993, stating as follows:

I. Enlargement of the Issues

Rivertown's October 4 Motion seeks enlargement of the issues to determine whether Sample Broadcasting Company, L.P., in its "Petition for Leave to Amend and Amendment" filed on September 17, 1993, misrepresented the facts surrounding the termination of the employment of Carmela Sample-Day by Station KKSI-FM on or about August 19, 1993, and if so, whether Sample possesses the requisite qualifications to be a Commission licensee. Rivertown noted that Sample's September 17 Petition and Amendment attributed

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the August 19 termination of Ms. Sample-Day's employment by Station KKSI to a "downsizing of station staff and elimination of the full-time News Department," whereas in fact she had been replaced in her position of News Director by Mark Denney, a full-time news director hired from a competing station in Ottumwa.

Sample's Opposition, stripped of its rhetoric, essentially asserts that Bruce Linder advised Ms. Sample-Day orally and in writing that she was being terminated because (according to Mr. Linder's August 18 letter:

> "we are phasing out the position of full-time newsperson [sic[1]] at KISS FM (O-Town Communications) as a cost saving measure,"

and that Linder's advice to her formed the basis for the Sample amendment of September 17. Significantly, Sample has submitted no statement from Mr. Linder, addressing the accuracy of the representations in his August 18 letter to Ms. Sample-Day, or otherwise justifying the claims in Sample's September 17 amendment concerning the elimination of the full-time news department.

Of equal significance, Sample does not deny that Ms. Sample-Day was promptly replaced by Mark Denney in the full-time position of KKSI's News Director (a fact which renders false Mr. Linder's representation to her as to the reason

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[1] Sample has heretofore endowed Ms. Sample-Day with the title of "News Director" at KKSI-FM.

for her termination[2]), nor does it deny that Ms. Sample-Day's job performance was a factor in her discharge.[3]

It is apparently Sample's position that its limited partnership arrangement not only insulates Mr. Linder from the customary comparative demerits flowing from his non-residence and media interests, but also insulates him from any obligation to be truthful in providing Ms. Sample-Day with information which he knew she would pass on to the Commission as fact, and which he intended the Commission to

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[2] Further evidence of its falsity is found in Sample's September 16 Amendment, wherein Ms. Sample-Day states that she "is currently seeking part-time, freelance employment with various broadcast stations . . ." If in fact she was willing to accept part-time employment, and if in fact KKSI was "down-sizing" and eliminating its full-time news department (as claimed in that amendment), a question arises as to why she was not retained at KKSI in a part-time position. Sample has made no effort to reconcile this obvious inconsistency.

[3] Mark Denney informed David Brown that Ms. Sample-Day had been discharged after a confrontation with KKSI's Operations Manager, Pat Snyder, following her failure to adequately cover a city election. Aside from pointing out that the election occurred on August 10 rather than August 17, as Mr. Brown believed Mr. Denney related (the Brown-Denney conversation occurred on September 5), Sample does not deny or otherwise challenge Denney's story.

That Ms. Sample-Day's discharge was not entirely amicable may also be inferred from the last sentence of Mr. Linder's letter of August 18 -- "It is understood that you will have a legitimate claim for unemployment from this company <u>and we have no intention of protesting such a claim</u>." (Emphasis added.) The underlined portion of that sentence would have been purely gratuitous had her discharge been as Sample has represented, but was of real significance to Ms. Sample-Day if her discharge had been based upon her abrupt departure following Mr. Snyder's criticism of her job performance, as stated by Mr. Denney.

rely upon. Thus, Sample argues (p. 4) that

> "To sustain a misrepresentation issue, Rivertown must show that Sample-Day knew the statement to be false and had motive to make a false statement. Fox River Broadcasting, Inc., 93 FCC 2d 127 (1983).

This is a simplistic view of the law: Surely, it is no defense to a misrepresentation charge that the individual responding on behalf of the applicant believed the falsehood supplied to the respondent by a co-principal who knew the information to be false.

Sample acknowledges (p. 3) that Rivertown has suggested that Sample's motivation in misrepresenting the reason for Ms. Sample-Day's discharge was a concern that it would detract from Sample's comparative case: Having lavished encomiums upon her diligence and managerial skills in his written and oral testimony, it would be unseemly and inconsistent for Mr. Linder to acknowledge that her post-hearing job performance had been a disappointment. It is correct, of course, that Rivertown's Motion provided "no evidence or statement from anyone with personal knowledge to support its conjecture" as to Sample's motivation: Since only Mr. Linder and Ms. Sample-Day have such personal knowledge, it is impossible to prove their motivation without the further hearing requested. That, after all, is the purpose of evidentiary hearings.

Sample's claim (p. 4) that "it would achieve no benefit from misrepresenting the reasons for her termination," is

clearly wrong; and its further claims that "Rivertown has shown no motive for Sample to mislead the Commission" and that Rivertown "concedes effectively that it cannot educe a motivation for Sample to have misrepresented the basis for her change in employment status" ignore the obvious.

In sum, Sample's implied concession that KKSI did not "downsize" its news department and did not eliminate its full-time News Director position leads ineluctably to the conclusion that Sample's September 17 amendment misrepresented those facts. If, as Sample claims, Ms. Sample-Day truly believed what Mr. Linder stated in his August 18 letter as the ground for her discharge, she was also deceived, by her limited partner, Mr. Linder. Sample's responsibility for misrepresentations made by its limited partner, or by its limited partner through its general partner, is no less than for those made by its general partner exclusively. The issues should be enlarged as requested.

II. Discovery Matters

Rivertown's Motion stated that, upon enlargement of the issues, it would

> "seek discovery of any documents in the possession of Ms. Sample-Day or any officer, employee, or agent (including attorneys) of Station KKSI relating to her discharge by the station in August 1993, or relating to any compensation or other payments to her thereafter; and would depose the following individuals: Carmela Sample-Day, Bruce Linder, Richard Brown, Mark Denney, Pat Snyder, and Mark McVey."

Sample (p. 6) resists providing documentation concerning any compensation paid to Ms. Sample-Day after her discharge, asserting that "[d]ocuments relating to any compensation Sample-Day may receive <u>from any source whatever</u> is unrelated to the requested issues" (emphasis added). Rivertown's request was not intended to be as broad as Sample has chosen to read it; rather, Rivertown seeks only such documentation relating to post-discharge payments to her by KKSI or Mr. Linder (Mr. Denney had advised Mr. Brown that Mr. Linder "was possibly assisting her financially until the Eldon proceeding was concluded"). While such evidence would not necessarily bear upon the misrepresentation issue requested, it would be highly relevant to the continuing question of the legitimacy of the Sample limited partnership and the financial arrangements between Mr. Linder and Ms. Sample-Day.

Sample also objects to Rivertown's proposed deposition of Messrs. McVey, Snyder, Denney, and Richard Brown, claiming that they "have provided no information on the requested issues," and that Rivertown has presented no basis to believe that any . . . have any personal knowledge surrounding Ms. Sample-Day's termination from KKSI." Sample's objection is specious: Mr. Denney's September 5 conversation with Mr. Brown (which Sample does not challenge) described his recent hiring as KKSI's new News

Director, to fill the vacancy created by Ms. Sample-Day's discharge; and set forth his understanding of the reasons for her discharge. While he did not advise Mr. Brown, in that conversation, of the source of his understanding, his deposition would lead to the discovery of such information.

Mr. Denney also informed Mr. Brown that KKSI's Operations Manager, Pat Snyder, had confronted Ms. Sample-Day concerning her failure to cover adequately the city election: Sample has offered no response from Mr. Snyder (or any other person) denying that such a confrontation occurred. The deposition of Mr. Snyder should reveal the details of any such confrontation, as well as the ensuing steps taken by Mr. Snyder leading to Ms. Sample-Day's termination.

As the record of this proceeding already establishes, Mr. McVey is the only officer and stockholder of O-Town Communications who is a full-time employee at Station KKSI. As such, it is highly improbable that he would be both uninvolved and uninformed as to Ms. Sample-Day's termination.

On further reflection, however, Rivertown concedes that Richard Brown's deposition is not essential, and that any information which he might have to impart would be both cumulative, and derivative of evidence which KKSI's officers and management (i.e., Mark McVey, Bruce Linder, and Pat Snyder) possess. Accordingly, Rivertown modifies its

discovery proposal to delete reference to Richard Brown.

III. Conclusion

Accordingly, it is respectfully urged that Rivertown's motion be granted, and that the issues herein be enlarged as requested.

Respectfully submitted,

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October 27, 1993

Certificate of Service

I, Donald E. Ward, do hereby certify that I have this 27th day of October, 1993, caused to be served by first class United States Mail, postage prepaid, a copy of the foregoing "REPLY TO 'OPPOSITION TO MOTION TO ENLARGE ISSUES'" to the following:

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