

NOV 24 1995

Before the
Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 a Construction Permit for)	
a New FM Station on Channel)	
280A at Westerville, Ohio)	

To: Honorable Walter C. Miller
Administrative Law Judge

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

David A. Ringer ("Ringer"), by and through counsel, hereby submits his Reply to the Findings of Fact and Conclusions of Law filed by the other mutually-exclusive applicants in the above-captioned proceeding. In support whereof, the following is shown:

RINGER DESERVES 100 PERCENT INTEGRATION CREDIT

1. The only applicant to seriously challenge Ringer's application was Ohio Radio Associates, Inc. ("ORA").^{1 2} ORA

¹ The only other applicant to challenge Ringer's application is ASF Broadcasting Corporation ("ASF") which concludes that, between the two, its application should be preferred. See ASF's "Proposed Findings of Fact and Conclusions." However, as Ringer has already shown, since ASF does not warrant any integration credit, its application simply cannot prevail.

No. of Copies rec'd
List ABCDE

Handwritten signature/initials

argues that Ringer should not receive integration credit because he has failed to "describe his current responsibilities (as to his land development company) and to specify the nature of his time commitments." ORA Findings at p. 16. However, the cases cited by ORA involve applicants that proposed to continue their commitments to outside businesses while pledging full-time integration to the new radio station. See, i.e., Naguago Broadcasting Co., 6 FCC Rcd 912, 924, n. 63 (Rev. Bd. 1991); Royce International Broadcasting, 5 FCC Rcd 7063, ¶7 (1990) and Pleasure Island Broadcasting, Inc., 6 FCC Rcd 4163, 4165, ¶16 (Rev. Bd. 1991). In those situations, it makes perfect sense that a proponent would be required to set forth a specific plan as to how he or she will accommodate the outside business interest. The difference here is that Mr. Ringer has stated unequivocally that he will terminate all other business pursuits and involve himself full-time in the new radio station. Unlike Shellee Davis's proposed plan, Mr. Ringer's integration proposal is realistic and believable and there is not a single piece of contrary record evidence. Therefore, Mr. Ringer has done all that the Commission expects of applicants in this situation. He has set forth a specific integration plan, reasonable on its

² ORA has not proposed any integration credit in this proceeding and, unless it is successful in tearing down the integration proposals of all of the other applicants, its application cannot hope to prevail. This may explain the speculative nature of some of the arguments it has put forth in this proceeding.

face and uncontradicted by any other evidence, and has never wavered from it. Therefore, his integration plan should be fully-credited.

2. ORA makes further widely-speculative arguments concerning a non-compete agreement that Mr. Ringer signed when he sold his interest in a local free shopper guide. See ORA's Findings at p. 3. Without citing to any portion of the record that would support its conclusion, ORA somehow finds that the existence of this agreement would limit Mr. Ringer's integration in the new Westerville station. ORA speculates that this agreement may include broadcast advertising, but the record is very clear that this was not the case. See, i.e., Tr. 150 & 155-156.³ On at least three occasions, Mr. Ringer specifically stated that the non-compete agreement did not include broadcast advertising. Id. Therefore, ORA's entire argument is based on a false premise and must be rejected.

NO DIVERSIFICATION DEMERIT IS WARRANTED FOR RINGER

3. ORA's request for a diversification demerit against Mr. Ringer is likewise flawed. ORA concludes that Ringer deserves a demerit because "his proposal to divest his interest in Station WYBZ-FM is not credible." ORA Findings at p. 17. Essentially, what ORA is arguing is

³ ORA complains that "Mr. Ringer declined to produce a copy of the agreement." However, the fact of the matter is that ORA never filed a document production request, seeking a copy of the agreement.

that, unless an applicant goes out and actually sells all of its other media interests, its promise to do so should not be credited. However, the Commission's long-standing policy has always been that: "as a general rule an applicant must make an explicit divestiture pledge of other broadcast interests by the "B" cut-off date in order to avoid a comparative demerit." Beach Broadcasting Ltd. Partnership, 6 FCC Rcd 885, ¶4 (Rev. Bd. 1991), citing, Julia S. Zozaya, 5 FCC Rcd 6607 (1990). The Commission has never said that Mr. Ringer must sell his other broadcast interest unless and until his application prevails in this proceeding and he is awarded a construction permit. Despite this fact, Mr. Ringer has gone even farther than Commission policy would require and has actually taken affirmative steps to sell his other FM station. There is absolutely no support, in either the record or in Commission precedent, for ORA's contention that he should be assessed a diversification demerit.

RINGER'S AUXILIARY POWER PROPOSAL SHOULD BE CREDITED

4. ORA argues that Mr. Ringer should not receive any credit for his proposal to supply auxiliary power at his studio and tower site. ORA's claims that Mr. Ringer's original budget did not include a specific itemization for auxiliary power and, therefore, his proposal should not be credited.⁴ However, as recognized by the Presiding Judge,

⁴ While ORA concludes that "Ringer failed to include auxiliary power generators in his cost estimates," Mr. Ringer testified that "...I have since budgeted. I mean, it's, it's --

Mr. Ringer "made a good faith attempt to budget the costs of construction and operation of his station." See Memorandum Opinion and Order, FCC 93M-603, released September 22, 1993. It has always been Mr. Ringer's intent to provide auxiliary power equipment for his station and, unlike the applicants in the cases cited by ORA, he made an effort to "budget" for auxiliary power. See Athens Broadcasting, Inc. 17 FCC 2d 452 (Rev. Bd. 1969) and Lind U. Kulinsky, 8 FCC Rcd 6235 (Rev. Bd. 1993). Therefore, Mr. Ringer's auxiliary power proposal should be credited.

THE COMMISSION'S CURRENT COMPARATIVE SCHEME SHOULD BE FOLLOWED

5. ORA argues that the Commission's integration policy is "arbitrary, capricious, irrational and otherwise contrary to the public interest." ORA's Findings at ¶25. However, ORA's argument completely ignore the Commission's decision in Anchor Broadcasting Limited Partnership, 8 FCC Rcd 1674 (1993) wherein the Commission stated it would continue to apply the integration criterion as it has in the past because "...we do not find it appropriate to prejudice applicants that incurred significant expenses litigating proposals that could potentially be rendered inferior by drastically new policy." Anchor Broadcasting Limited Partnership, supra, at ¶18. Given the Commission's pronouncement in that case, ORA's arguments concerning the

the money is in place in my budget." Tr. 166.

Commission overall comparative scheme should be ignored.

CONCLUSION

6. Since none of the other applicants have raised any arguments that would deny the grant of Ringer's application, the ultimate outcome of this proceeding, as outlined in Ringer's Findings and Conclusions, remains unchanged.

WHEREFORE, the above-premises considered, David A. Ringer once again respectfully requests that his application for a Construction Permit for a new FM station at Westerville, Ohio be **GRANTED** and that the mutually exclusive applications of ASF, Wilburn, Davis and ORA be **DENIED**.

Respectfully submitted,

DAVID A. RINGER

By:



Arthur V. Belendiuk
Shaun A. Maher

His Attorneys

SMITHWICK & BELENDIUK, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036
(202) 785-2800

November 4, 1993

lpd/westerville/1104.fin

CERTIFICATE OF SERVICE

I, Lori Paige DiLullo, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 4th day of November, 1993, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

The Honorable Walter C. Miller (*)
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Room 213
Washington, DC 20554

James Shook, Esq. (*)
Hearing Branch
Federal Communications Commission
2025 M Street, N.W.
Room 7212
Washington, DC 20554

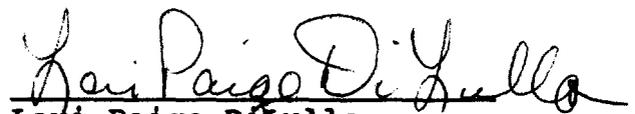
James A. Koerner, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20015-2003
Counsel for ASF Broadcasting Corp.

Dan J. Alpert, Esq.
Law Office of Dan J. Alpert
1250 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for Shellee Davis

Stephen T. Yelverton, Esq.
McNair & Sanford, P.A.
Madison Office Building
Suite 400
1155 Fifteenth Street, N.W.
Washington, DC 20005
Counsel for Ohio Radio Associates, Inc.

Eric S. Kravetz, Esq.
Brown, Nietert & Kaufman, Chartered
1920 N Street, N.W.
Suite 660
Washington, DC 20036
Counsel for Wilburn Industries, Inc.

(*): By Hand Delivery


Lori Paige DiLullo