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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

Federal Communications Commission

Washington, D.C. 20554

In re Applications of	)	**MM DOCKET NO. 93-264**
	)	
FRANK B. DUROSS	)	**File No. BPH-920512MC**
	)	
KENNETH F. ROSER, JR.	)	File No. BPH-920513MI
	)	
KEVIN O'KANE	)	File No. BPH-920514MK
	)	
For a Construction Permit for a New FM Station on Channel 250A, at Whitesboro, New York	)	

To: Honorable Joseph P. Gonzalez
Administrative Law Judge

REPLY TO OPPOSITION TO MOTION TO ENLARGE ISSUES

Frank B. DuRoss, by and through counsel, and pursuant to §1.229 of the Commission's Rules, hereby submits his Reply to the "Opposition To Motion To Enlarge Issues" ("Opposition") submitted by Kenneth F. Roser, Jr. ("Roser") in the above-referenced comparative. In support whereof, the following is shown:

Roser Has Failed To Address The Issues Raised In The Motion To Enlarge

1. In the Motion To Enlarge Issues, DuRoss noted that, Roser had stated in his Standard Document Production that there were no documents to support his financial certification. Since Roser's application showed that he was relying on himself for $100,000 and a commitment from Marine Midland Bank ("MMB") for another $100,000 for his financing, DuRoss questioned how Roser could have made an affirmative financial certification in the absence of any supporting documentation.

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2. In his Opposition, Roser produced documents that he contends will show that he had $200,000 from committed sources, at the time he filed his Whitesboro application. The simple answer is that Roser has never had $200,000 of his own money or from any other source that he could rely upon for his Whitesboro financing. The documents he produced to demonstrate his own personal commitment of $100,000 (his 1991 and 1993 balance sheets), do not show sufficient net liquid assets to meet this commitment. Furthermore, to demonstrate his commitment from Marine Midland Bank ("MMB"), Roser produced only a recent letter from a bank official, referring to a line of credit that Roser claims he established and has "drawn down". However, this letter, addressed to Roser's business, makes no mention of when the line of credit was "drawn down" or whether it was to be used solely for the Whitesboro radio station project. Most importantly, Roser has not produced a single document to show the current status of this phantom $100,000. These fatal omissions and the lack of other supporting documentation, raise the question as to whether Roser has misrepresented his financial qualifications to the Commission.

Roser Has Misrepresented His Personal Financial Capabilities

3. Roser argues that, at the time he made his financial certification, he had his 1991 balance sheet available to him and that this document was sufficient to demonstrate his proposed $100,000 commitment. See Opposition at p. 2.

However, neither his 1991 nor his 1993 balance sheet evidence sufficient net liquid assets to support Roser's claims. The only liquid assets listed on Roser's 1991 balance sheet are cash ($24,700.00) and his IBM stock ($11,000). See Exhibit 1. The remainder of his assets are non-liquid, including such items as real estate, interests in various companies and other personal items, such as furs, jewelry, etc., which Roser claims are worth over a million dollars. Id.[1] However, Roser has produced no further documentation to demonstrate the values he has personally assigned to each of these assets.

4. In Capitol City Broadcasting Company, FCC 93-514, released December 7, 1993 ("Capitol City"),[2] the Commission reviewed the financial plan of an applicant that had relied substantially upon non-liquid assets to support its financial certification. In that recently released decision, the Commission stated that "Non-liquid assets such as real estate may...provide reasonable assurance of financial qualifications, but only if the claimed value of those assets is adequately substantiated and if the assets are several times the value of the cash which such assets are relied upon to yield." Capitol City at ¶9. In that case, the Commission

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[1] Mr. Roser's most recent 1993 balance sheet likewise shows only $28,722.80 in liquid assets.

[2] A courtesy copy of this decision is attached as Exhibit 2.

found that an applicant relying on non-liquid assets to support its financial qualifications, failed to meet "its burden of showing that these assets were readily convertible to cash at the time of certification." Capitol City at ¶10. Furthermore, the Commission found that the applicant had not "submitted valid appraisals or affidavits substantiating the claimed value of the real estate and the other illiquid assets at the time of certification, as is generally required where an applicant relies on illiquid assets as a basis of its financial qualifications." Capitol City at ¶10, citing, Christian Children's Network, 101 FCC 2d 612, 614 (1985).

5. This case mirrors the factual scenario presented to the Commission in Capitol City. Neither Roser's 1991 or 1993 balance sheets show liquid assets sufficient to support his claim that he will contribute $100,000 to the construction and operation of his new station. While Roser's balance sheet show certain non-liquid assets, Roser has not produced a single document to confirm that, at the time he certified his application, he was aware of the true market value of these assets.[3] In the absence of such documentation, such as "reliable appraisals setting forth the precise calculation bases for their ultimate valuation" of each non-liquid asset,

[3] Furthermore, the $100,000 line of credit, that Roser claims to have established for his Whitesboro project, does not appear on either of his balance sheets. This raises the question of whether Roser's balance sheets truly reflective all of his liabilities and are an accurate depiction of his overall net worth.

it is extremely questionable whether Roser could honestly say that he had $100,000 at his disposal when he filed his application. Margaret Escriva, 6 FCC Rcd 4455, 4457-58 (Rev. Bd. 1991). This raises the question of whether Roser, who claims to have reviewed his 1991 balance sheet prior to signing his application, realized that he had far less than $100,000 in liquid assets on hand and, nevertheless, knowingly misrepresented his financial abilities to the Commission. The issues in this proceeding should be enlarged to determine whether Roser's financial certification was false and whether he has misrepresented his personal financial qualifications.

Roser Has Never Had Reasonable Assurance From Marine Midland Bank

6. More disturbing is the evidence produced by Roser concerning his purported $100,000 "line of credit" from MMB. Upon closer examination, it is clear that Roser has never had a commitment from MMB to fund his new Whitesboro radio station. Roser contends that, prior to certifying his financial qualifications, he established a line of credit with MMB for the purpose of funding one-half of his Whitesboro financing. However, he has not produced a single document in support of his claim. All we have is his own self-serving declaration and a recent, incomplete letter from MMB, neither of which would tend to show: (a) that Roser had the requisite "reasonable assurance" from the bank prior to filing his application; (b) that the line of credit was

established for the express purpose of funding Roser's new Whitesboro station; or (c) that the $100,000 is still available to him and hasn't already been spent on his other business ventures.[4]

7. The recently supplied letter from MMB, states only that a $100,000 line of credit was established by Roser in April, 1992. See Exhibit 3. However, neither the MMB letter, nor any of the other documents produced by Roser, show when the line of credit was "drawn down," as Roser claims. Therefore, the important question remains: Where is the $100,000 that Roser claims he has for the Whitesboro project? It does not appear on his 1993 balance sheet nor has Roser supplied any other documents to show that he is currently holding it in another account. Given these facts, there is a strong possibility that Roser has already drawn and spent all or some of the $100,000 line of credit on his other businesses.

8. The fact that Roser's line of credit has more than likely already been used for his other businesses is further evidenced by the fact that the letter from MMB was addressed

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[4] If the issues are added in this proceeding, Roser should also be ordered to produce any and all documents that existed at the time he filed his application that would evidence the establishment of a line of credit from Marine Midland Bank, including, but not limited to: copies of any loan applications, correspondence between Mr. Roser and the bank, and/or any documents provided to the bank by Mr. Roser in order to qualify for the loan. Mr. Roser should also produce any and all documents that evidence the current status of this line of credit.

to "Mr. Kenneth Roser, Professional Media Services, Inc.," and makes no mention of the radio station. Id. It is questionable whether the bank even knows that Roser intended to rely on the line of credit for the purpose of building his new Whitesboro station. This is an important fact, for as the Review Board recognized in Scioto Broadcasters, L.P., 5 FCC Rcd 5158, 5161 (Rev. Bd. 1990), a borrower and lender must specifically agree on the intended use of the funds, in order to find that the requisite "reasonable assurance" existed. None of the documents submitted by Roser show that, at the time he filed his Whitesboro application, MMB Bank was aware that it may be loaning $100,000 to him for the purpose of building a new radio station in Whitesboro, New York. Therefore, the November, 1993, letter from MMB lacks the necessary information to demonstrate that Roser truly had "reasonable assurance" from MMB that it intended to make $100,000 available to him for his radio station proposal.

9. An attempt was made on December 3, 1993, to contact the author of the MMB letter to verify Roser's claims. Counsel spoke with Mr. Anthony F. Munski who verified that a line of credit had, in fact, been established by Roser but that it was established for Roser's business - Professional Media Services, Inc., and that the bank was unaware of Roser's plans to use the $100,000 line of credit for a new radio station at Whitesboro. Counsel asked Mr. Munski if he would provide a letter to that effect and Mr. Munski agreed.

Later that same day, counsel received a facsimile letter from Mr. Munski wherein he stated "I have been advised by Roser not to provide any information on the above account." See Exhibit 4. The account referenced by Mr. Munski in his facsimile letter was "Professional Media Inc/Kenneth Roser." Id. It is understandable that Roser would block his bank from releasing any information on his line of credit, since he realized that MMB was completely unaware that he intended to use his line of credit for his new radio station venture. This would explain why Mr. Munski's recent letter was addressed to Roser's other business and never once mentioned his Whitesboro proposal. Since the $100,000 line of credit was never established for Roser's new radio station, and since Roser has failed to show the current status of this money, there exists a clear question of whether Roser has misrepresented the availability of these funds. The issues in this proceeding should be enlarge to determine whether Roser's continued misrepresentations constitute disqualifying conduct of the magnitude that would warrant dismissal of his application from this proceeding.

Roser Has Withheld Documents and Misrepresented Their Status

10. Additionally, Roser's actions with respect to document production are a separate cause for concern. In the cover letter that accompanied his Standard Document Production, Roser stated unequivocally that "No documents exist that are known to the applicant." Roser now admits

that this statement was not true and that, at the time he exchanged his documents, he was aware of the existence of his 1991 balance sheet. However, if Roser was, as he says, truly having trouble locating his 1991 balance sheet, he simply could have noted the same in his Document Production cover letter and promised to produce it as soon as possible. Instead, he made a clear misrepresentation in an obvious attempt to avoid having to produce a document that, as has been shown, raises serious questions about his financial qualifications. The motive to deceive the Commission was obvious in this case. The more troubling fact is that it is extremely questionable whether this document would have ever surfaced but for Mr. DuRoss' filing his Motion To Enlarge, thus necessitating a response by Roser. This fact raises the question of whether Roser has intentionally withheld documents in this proceeding and/or misrepresented their status in his Standard Document Production. The addition of further misrepresentation issues against Roser are, therefore, warranted in this case.

Conclusion

11. Ken Roser's actions show an applicant without sufficient funds to meet his proposed $200,000 budget, scrambling to cover-up a false financial certification. The representations made in his Opposition have done little to clear up the lingering doubts raised in the Motion To Enlarge Issues and have, in fact, raised additional serious questions

concerning his truthfulness and basic qualifications. Roser has the burden of proving that he is financially qualified. See Aspen FM, 6 FCC Rcd 1602, 1603 (1991). The showing he made in his Opposition fails to meet this burden. Given Roser's actions, it appears that the only possible method of unearthing the entire truth surrounding his financial certification is to enlarge the issues in this proceeding and to order Roser to produce those documents listed in the Motion To Enlarge Issues and this Reply. See note 4.

WHEREFORE, the above premises considered, it is respectfully requested that the issues in this proceeding be enlarged against Kenneth J. Roser, Jr., as outlined in Mr. DuRoss herein and that Roser be ordered to produce those additional documents requested in the Motion To Enlarge Issues and herein.

Respectfully submitted,
FRANK B. DUROSS

By: _____
Arthur V. Belendiuk
Shaun A. Maher

His Attorneys

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

December 13, 1993

lpd/whitesbo/12-13.rpl

EXHIBIT 1

RSONAL
ANCIAL
ATEMENT

KENNETH F. ROSER, JR.	Birth Date 10/14/55	Social Security Number 10 / 7 / 1 / -15 / 2 / -7 / 6 / 2 / 9 /	Home Telephone No. 815 797-8236
5819 GRAHAM ROAD (SAME RESIDENCE NEW#)		Previous Address 726 DEEFIELD DRIVE E.	Years There 3
DEERFIELD State NY Zip 13502		City UTICA State NY Zip 13502	
Employer SELF EMPLOYED	Years There 11	Your Position OWNER/PRESIDENT	Business Telephone No. 815 797-8236
Address 5819 GRAHAM ROAD DEERFIELD, NY.		Number of Dependents 2 Ages 12 & 8 years old	
Name ROXANNE ROSER		Relationship WIFE	Social Security Number 10 / 7 / 8 / -15 / 4 / -6 / 2 / 8 / 2 /

CASES USE THE WORD "NONE" WHERE NO AMOUNT IS TO BE ENTERED. MARK WITH AN ASTERISK(*) THOSE ASSETS OWNED Y WITH ANYONE ELSE AND THOSE LIABILITIES OWED JOINTLY WITH ANYONE ELSE.

ASSETS	DOLLARS	CENTS	LIABILITIES AND NET WORTH	DOLLARS	CENTS
hand	2 000	00	Notes Payable to this Bank	none	
this Bank	21 322	80	Notes Payable to ( ) Bank	none	
( ) Bank	none		Other Notes & Installment Contracts Payable (See Schedule E)	none	
ue Life Insurance (See Schedule A)	2 000	00			
ate (See Schedule B)	370 000	00	Accounts Payable	none	
Marketable Securities	5 400	00	Unpaid Real Estate Taxes	none	
ROSER COMM.NET	225 000	00	Liability for Income Taxes	none	
rketable Securities (See Schedule D)			Mortgages on Real Estate	76 161	46
ties & Other Personal Property	45 000	00	Other Liabilities - Itemize:	NONE	
ate - Itemize: FURS, JEWELRY	8 000	00			
SIONAL MEDIA SERVICES, INC.	1,000 000	00	Total Liabilities	76 161	46
PATH COMMUNICATIONS	100 000	00	Net Worth	1,702 561	34
	1,778 722	80	TOTAL	1,778 722	80

Please complete IN FULL including negative replies.

AL INCOME: Income from alimony, maintenance and child support need not be revealed if you choose not to rely on such income.

$ 69,510.00 Fees or Commissions $ _____ Dividends $ 1058.00 Other Income $ 19,200.00 RENT

ndents: Number 2 Ages 12 & 8 YRS.

you any liability on notes or accounts receivable discounted or sold? NO If so, give details _____

u endorser, guarantor or accommodation maker for others (including obligations due to Marine Midland Bank)? _____

tate amount $ NO and for whom _____

you any liability on real estate mortgage bonds covering property NOT SHOWN on this statement? _____ If so, give details NO

ere any suits, foreclosures, or unsatisfied judgments against you, or have you ever gone through bankruptcy or made a general assignment? give details NO

you any liability in leases? _____ If so, give details NO

you any other contingent liability of any kind? _____ If so, give details NO

u have a will? ☐ YES ☒ NO If so, who is the executor? _____

DULE A - LIFE INSURANCE (Excluding Health, Accident or Special Benefit)

CE OUNT	NAME OF INSURANCE COMPANY	OWNER OF POLICY	BENEFICIARY	TYPE OF POLICY	CASH VALUE	LOANS AGAINST POLICY	GIVE NAME OF ASSIGNEE, IF ANY
.000	PRUDENTIAL INS.	KEN ROSER, JR	ROXANNE	LIFE	2,000.00	none	
			TOTAL (as shown on statement)		$	$	

Insurance (amounts and kinds) $ _____ $ _____ $ _____

EDULE B – REAL ESTATE OWNED

D AND BUILDINGS OWNED AND MORTGAGES PAYABLE (Attach Separate Schedule if Necessary)

Location	Description of Buildings	Name of Owner of Record	Owner's Valuation	Assessed Value	Insured For	Taxes in Arrears
5819 GRAHAM RD	LARGE CEDAR CONTEMPORARY	KENNETH & ROXANNE	500,000	48,000	full value	NONE

Mortgage	Amount	Held By	Rate Interest	Maturity Date	Amount Due Within 1 Yr.	Terms of Payment on Balance	Mortgage Interest in Arrears
1st	76,161	MARINE MIDLAND BANK	7.5			MONTHLY PYMTS.	NONE
2nd							

Location	Description of Buildings	Name of Owner of Record	Owner's Valuation	Assessed Value	Insured For	Taxes in Arrears
341 S. SECOND ST	ONE STORY BLDG.	KEN & ROXANNE	50,000		full v	none

Mortgage	Amount	Held By	Rate Interest	Maturity Date	Amount Due Within 1 Yr.	Terms of Payment on Balance	Mortgage Interest in Arrears
1st		NONE					
2nd							

AL $ 350,000.00 (as shown on statement) 50% OWNERSHIP OF HOME OLD FLOYD RD. FLOYD, NY $90,000.00

details concerning any mortgage installments or interest in arrears

details concerning any taxes and assessments due and unpaid

ny of the above parcels covered by a collateral mortgage NOT SHOWN in mortgage schedule? NO If so, give amount and by whom held

ere any other liens of any nature against any of the above property? NO If so, give details

EDULE C – U.S. GOVERNMENT & MARKETABLE SECURITIES (Attach Separate Sheet if Necessary)

Shares Bonds	Name of Security	Where Traded	In Whose Name Reg.	Market Value Statement Date	Valuation Used in Statement	If Pledged or Loaned State to Whom
	IBM	STOCK EXCHANGE	KENNETH F. ROSER, JR	5400.00	5400.00	

TOTAL $5400.00 (as shown on statement)

EDULE D – NON-MARKETABLE SECURITIES (Attach Separate Sheet if Necessary)

Shares Bonds	Name of Security	In Whose Name Reg.	Source of Value	Valuation Used in Statement	If Pledged or Loaned State to Whom

TOTAL $ (as shown on statement)

EDULE E – OTHER NOTES AND INSTALLMENT CONTRACTS PAYABLE (Attach Separate Sheet if Necessary)

Payable to	Amount	Terms of Payment and Security Pledged, if Any

TOTAL $ (as shown on statement)

ture

arine Midland Bank, N.A.

e you this statement knowing it will be relied on by you from time to time. This statement is a true and complete description of my financial dition as of this date. You may rely upon it until I tell you of any material change in it or until I give you a new statement. It shall be an event of ult if anything in this statement turns out to have been false as of the date of this statement. You can obtain a credit report about me in connection this statement and any update or renewal of it. If you obtain a credit report, you will tell me the name and address of the credit bureau if I ask you ou may verify what I have stated in this statement and exchange with others information about your credit and deposit transactions with me.

Signed this 31 st. day of MARCH 19 93

At 5819 GRAHAM ROAD UTICA, NY 13502

L529SF

TO Seneca Street OFFICE

MARINE MIDLAND BANK

PERSONAL FINANCIAL STATEMENT, CREDIT APPLICATION AND AGREEMENT

[ ] by Applicant only [X] jointly with Roxanne Roser Relationship Wife

APPLICANT(S)

Applicant Kenneth F. Roser Jr. Financial Condition as of 01 July, 1991

RR1 Box 195F Groton Road Occupation Self Employed Adv.

10/14/55 Telephone Number (315) 797-8236 Employer Self Employed

ASES USE THE WORD "NONE" WHERE NO AMOUNT IS TO BE ENTERED. MARK WITH AN ASTERISK (*) THOSE ASSETS OWNED WITH ANYONE ELSE AND THOSE LIABILITIES OWED JOINTLY WITH ANYONE ELSE.

ASSETS	DOLLARS	CENTS	LIABILITIES AND NET WORTH	DOLLARS	CENTS
and			Notes Payable to this Bank		
us Bank	24700	00	Notes Payable to ( ) Bank		
) Bank			Other Notes & Installment Contracts Payable (See Schedule E)		
e Life Insurance (See Schedule A)	1501	00			
e (See Schedule B)	370000	00	Accounts Payable		
ernment & Marketable Securities	11000	00	Unpaid Real Estate Taxes	— 0	—
nedule C)			Liability for Income Taxes	— 0	—
etable Securities (See Schedule D)	60000	00	Mortgages on Real Estate	91 848	00
es & Other Personal Property	25000	00	Other Liabilities — Itemize:		
sets — Itemize: Furn, Jewelry	4000	00	Credit Card	1642	00
ness Interest - 100%					
ership: Professional Media					
ces Inc.	500	000	Total Liabilities	93 485	00
Communications Net, Inc	75	000	Net Worth	977 716	00
TOTAL	1071	201	TOTAL	1071	201

lease complete IN FULL including negative replies.

. INCOME: Income from alimony, maintenance and child support need not be revealed if you choose not to rely on such income.

Fees or Commissions $ Dividends $ Other Income $

Dependents: Number Ages 6 + 10 yrs old

y liability on notes or accounts receivable discounted or sold? If so, give details

er, guarantor or accommodation maker for others (including obligations due to Marine Midland Bank)?

mount $ and for whom

liability on real estate mortgage bonds covering property NOT SHOWN on this statement? If so, give details

ny suits, foreclosures, or unsatisfied judgments against you, or have you ever gone through bankruptcy or made a general assignment?

details

ny liability in leases? If so, give details

contingent liability of any kind? If so, give details

a will? [ ] YES [ ] NO If so, who is the executor?

SCHEDULE A — LIFE INSURANCE (Excluding Health, Accident or Special Benefit)

NAME OF INSURANCE COMPANY	OWNER OF POLICY	BENEFICIARY	TYPE OF POLICY	CASH VALUE	LOANS AGAINST POLICY	GIVE NAME OF ASSIGNEE, IF ANY
				1501.00		
			TOTAL (as shown on statement)	$1501.00	$ —	

nce (amounts and kinds) $ $ $

v.4/89 PLEASE ANSWER ALL QUESTIONS ON BOTH SIDES OF THIS FORM AND SIGN ON THE REVERSE SIDE (Over)

SCHEDULE B — REAL ESTATE OWNED

LAND AND BUILDINGS OWNED AND MORTGAGES PAYABLE (Attach Separate Schedule if Necessary)

Location	Description of Buildings	Name of Owner of Record	Owner's Valuation	Assessed Value	Insured For	Taxes in Arrears

Mortgage Amount	Held By	Rate Interest	Maturity Date	Amount Due Within 1 Yr.	Terms of Payment on Balance	Mortgage Interest in Arrears
	See Attached					

Location	Description of Buildings	Name of Owner of Record	Owner's Valuation	Assessed Value	Insured For	Taxes in Arrears

Mortgage Amount	Held By	Rate Interest	Maturity Date	Amount Due Within 1 Yr.	Terms of Payment on Balance	Mortgage Interest in Arrears

TOTAL $ (as shown on statement)

...g any mortgage installments or interest in arrears _____

...ncerning any taxes and assessments due and unpaid _____

...ove parcels covered by a collateral mortgage NOT SHOWN in mortgage schedule? _____ If so, give amount and by whom held _____

...ns of any nature against any of the above property? _____ If so, give details _____

SCHEDULE C — U.S. GOVERNMENT & MARKETABLE SECURITIES (Attach Separate Sheet if Necessary)

Name of Security	Where Traded	In Whose Name Reg.	Market Value Statement Date	Valuation Used in Statement	If Pledged or Loaned State to Whom
IBM	Stock Exchange	—	7-31-91	Market	

TOTAL $ 11,000 (as shown on statement)

SCHEDULE D — NON-MARKETABLE SECURITIES (Attach Separate Sheet if Necessary)

Name of Security	In Whose Name Reg.	Source of Value	Valuation Used in Statement	If Pledged or Loaned State to Whom
Tompath Communications Ltd	Kenneth	Financial Statement	Book Value	

TOTAL $ 60,000.00 (as shown on statement)

SCHEDULE E — OTHER NOTES AND INSTALLMENT CONTRACTS PAYABLE (Attach Separate Sheet if Necessary)

Payable to	Amount	Terms of Payment and Security Pledged, If Any

TOTAL $ (as shown on statement)

...LOWS: 1. MEANING OF WORDS. "I" or "my" means everyone who signs below. "You" or "your" means Marine Midland Bank. "Statement" ...nal financial statement, credit application and agreement of mine. 2. RELIANCE ON STATEMENT. I give you this statement knowing it will ...you from time to time. 3. MY REPRESENTATIONS. This statement is a true and complete description of my financial condition as of this date. ...on it until I tell you of any material change in it or until I give you a new statement. 4. EVENTS OF DEFAULT. If I owe you any debt, or if ...wes you ...ht which I indorsed, guaranteed or otherwise agreed to pay, you have the right to call for immediate payment of that debt by me: ...vent, ...krupt or incompetent or die or go out of business; if anything in this statement turns out to have been false as of the date of this ...break ...y written promise I make to you. 5. CREDIT REPORTS. You can obtain a credit report about me in connection with this statement ...or renewal of it. If you obtain a credit report, you will tell me the name and address of the credit bureau if I ask you to. You may verify what ...this statement and exchange with others information about your credit and deposit transactions with me.

...this 8th day of August, 19 91 At RR1 Box 195F Hudson Falls NY

...nt's Signature [signature] Social Security Number 071-52-7629

...Signature [signature] Social Security Number 078-54-5282

TH F. & ROXANNE ROSER, JR.
BOX 195F GRAHAM ROAD
NY 13502

ULE "B" REAL ESTATE

NCE	GRAHAM ROAD, UTICA, NY	
	FAIR MARKET VALUE	$300,000.
	MORTGAGE 91,842.80	
AMILY HOUSE	50% OWNERSHIP OLD FLOYD ROAD FLOYD, NY	
	FAIR MARKET VALUE	20,000.
MMERCIAL PROPERTY	341 S. SECOND STREET LITTLE FALLS, NY	
	FAIR MARKET VALUE	50,000.
	TOTAL REAL ESTATE	$370,000.
	MORTGAGE	91,842.80

EXHIBIT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY — File No. BPH-880812MZ

MATTHEW WILLIAMS — File No. BPH-880816OC

For Construction Permit for a New FM Station on Channel 247C2 in Longview, Texas

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1993; Released: December 7, 1993

By the Commission:

1. In this proceeding, the Review Board disqualified Matthew Williams on a lack of candor/misrepresentation issue, affirmed the ALJ's denial of Williams' various requests for financial issues against Capitol City, denied Williams' request to reopen and remand the proceeding on similar financial issues, and granted Capitol City's application.[1] Based upon the pleadings before us,[2] we agree with and affirm the Board's disqualification of Williams. We conclude, however, that there are substantial and material questions as to Capitol City's basic qualifications. We therefore deny to the extent reflected herein and dismiss in all other respects Williams' application for review,[3] grant to the extent reflected herein and dismiss in all other respects his Second Petition to Reopen the Record, set aside the Board's grant of Capitol City's application and remand the case for further evidentiary hearings.

BACKGROUND

2. To fund its application, Capitol City relies on a loan commitment letter, dated July 16, 1988, in the amount of $275,000 from Malvin Patterson, whose son, Ronald Patterson, is a 50% owner of the application. (The amount of the commitment was originally redacted but ultimately revealed). To rebut Williams' allegations concerning Capitol City's financial qualifications, Capitol City submitted a statement under penalty of perjury from Ronald Patterson verifying that he had reviewed Malvin's financial statement before certifying that Capitol City was financially

[1] *Capitol City Broadcasting Company*, 8 FCC Rcd 1726 (Rev. Bd. 1993), affirming, 7 FCC Rcd 1938 (Initial Decision 1992).

[2] In addition to the pleadings listed in note 7 below, the following pleadings are pending before the Commission: (a) Application for Review, filed April 12, 1993, by Williams; (b) an Opposition, filed April 27, 1993, by Capitol City Broadcasting Company; (c) Second Petition to Reopen the Record, filed April 14, 1993, by Williams; (d) Opposition to Second Petition to Reopen the Record, filed April 23, 1993, by Capitol City Broadcasting Company; (e) Further Opposition to Second Petition to Reopen the Record, filed April 28, 1993, by Capitol City Broadcasting Company; (f) Erratum to Further Opposition to Second Petition to Reopen the Record, filed April 29, 1993, by Capitol City Broadcasting Company; (g) Supplement to Further Opposition to Second Petition to Reopen the Record, filed May 6, 1993, by Capitol City Broadcasting Company; and (h) Reply to Oppositions to Second Petition to Reopen the Record, filed May 10, 1993, by Williams.

[3] In his application for review, Williams notes the Board's refusal to disqualify Capitol City or at least add a character issue against it based upon the February 12, 1992 signing by its 50% owner, Ronald Patterson, of an "Agreement to Assessment and Collection of 100-Percent Penalty," consenting to a penalty for violation of 26 U.S.C. § 6672 of the Internal Revenue Code for Patco's not paying over to the IRS employment taxes withheld from the salaries of Patco employees. (Patco is Patterson's now-defunct company.) Although the Board observed that this is a case of first impression, we agree that a character issue is not warranted. At the outset, we note that the Commission has previously ruled that consent decrees are generally not relevant to character qualifications; rather, only adjudications are considered. *Character Policy Statement*, 6 FCC Rcd 3448 ¶ 6 (1991). Williams is correct that, if willful, such failure to collect or pay over taxes required to be withheld from employees' wages, is a felony, and that felony convictions are relevant under the *Character Policy Statement*, 5 FCC Rcd 3252 ¶ 4 (1990). However, the penalty to which Patterson agreed is civil in nature, *Gephart v. U.S.*, 818 F.2d 469 (6th Cir. 1987), and a finding of willfulness requires proof beyond a reasonable doubt that, when due, the taxpayer (i.e., the now defunct Patco) had sufficient funds to pay over taxes that had been withheld. *U.S. v. Poll*, 521 F.2d 329 (9th Cir. 1975). Moreover, the agency charged with enforcing the tax code has not sought a conviction against Ronald Patterson based on his consent to the penalty, and thus no adjudication was involved. Finally, the underlying tax violation is not so egregious, particularly given the lack of evidence of willfulness, as to shock the conscience or require further inquiry despite the absence of a conviction. *Character Policy Statement*, 5 FCC Rcd at 3254 n.5. We note, however, that evidence that the IRS has obtained a conviction against Patterson based on his consent to the 100% penalty would warrant reconsideration of this matter.

In a related matter, although the parties dispute, as they did before the Review Board, the amount of the penalty owed by Ronald Patterson for the failure to pay over the taxes withheld from the wages of Patco employees, we find no basis for a finding that Williams is guilty of abuse of process in rearguing this matter, as Capitol City contends.

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qualified. Although Capitol City had produced a copy of the commitment letter in response to a discovery request, it did not submit a balance sheet documenting that at the time of certification Malvin Patterson had sufficient financial resources to meet the $275,000 commitment to the applicant.

3. In light of allegations that Ronald Patterson was virtually bankrupt[4] and that Malvin Patterson had repeatedly failed to pay real estate taxes on numerous properties in a timely manner, and the fact that Malvin Patterson had promised that he would intervene if lienholders proceeded directly against the station or its assets to satisfy Ronald's unpaid taxes,[5] Capitol City was requested to produce the financial statement that Ronald Patterson reviewed in certifying Capitol City's financial qualifications and/or a financial statement reflecting Malvin Patterson's net liquid assets at the time of certification, and a current financial statement reflecting Malvin Patterson's net liquid assets.[6] *Order*, FCC 93I-039, at ¶ 6 (OGC released July 6, 1993).[7] Such additional documentation was required because -- although the Board properly concluded that Williams had not raised a substantial and material question of fact warranting the addition of basic qualifications issues against Capitol City -- the precarious financial condition of Ronald Patterson, together with the lender's affirmative promise to intervene, raised significant concerns about the continuing viability of the applicant's financial proposal. In its response Capitol City submitted financial statements, dated May 1, 1988 and June 30, 1993, from Malvin Patterson, and a $275,000 loan commitment letter, dated July 21, 1993, from the State First National Bank of Texarkana, Arkansas. For the reasons set forth below, we find that there are substantial and material questions of fact requiring that we reopen the record and remand this proceeding for evidentiary hearings on false certification, misrepresentation/lack of candor, and financial qualifications issues against Capitol City.

4. Capitol City identifies the May 1988 financial statement as the one that Ronald Patterson reviewed in preparing to certify Capitol City's financial qualifications. It explains that the current financial statement, as well as the $275,000 bank letter to be secured by the assets listed on the current statement, are submitted, not to change the financial proposal, but to demonstrate Malvin Patterson's ability to liquidate his assets for purposes of financing the proposed station. According to Capitol City, the two statements reflect that Malvin Patterson's financial condition has not, as Williams' claims, deteriorated since 1988.[8] Acknowledging that most of Malvin Patterson's wealth derives from his real estate holdings, valued at $727,000 in May 1988 and $747,000 in June 1993, Capitol City urges that it was permissible for Malvin Patterson to rely on non-liquid assets to provide the funding required for the proposed station.

5. In reply, Williams urges that Capitol City's response confirms that it is not, and never has been, financially qualified, and that Ronald Patterson has repeatedly lied under oath regarding those financial qualifications. According to Williams, the two financial statements show that, contrary to the claim that Malvin Patterson had sufficient net *liquid* assets to fund the application, he had virtually no net liquid assets at certification or thereafter. According to Williams, the statements, despite the express request of the General Counsel's Order, fail to disclose the extent to which Malvin Patterson's real estate is subject to mortgages or other encumbrances.[9] He alleges further that the 1993

[4] In addition to the tax liens noted in note 3 above, which Capitol City admits is almost $20,000 and which Williams alleges is closer to $60,000, Ronald Patterson is subject to outstanding judgments amounting to at least $14,151.60, he lost his home, he defaulted on his car loan, he was unemployed from October 1990 (when he was fired) to February 1993, and the company that he and his wife jointly owned, Patco Enterprises, is now out of business.

[5] See Declaration of Malvin Patterson at 1, dated April 28, 1992 and attached to Further Opposition to Second Petition to Reopen the Record, filed April 28, 1993, by Capitol City.

[6] See *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1586 ¶ ¶ 15-16 (1992), where, despite the existence of a bank commitment letter issued with knowledge of the applicant's bankruptcy, questions were raised that could not be resolved solely on the applicant's reliance on the bankruptcy court's approval of its reorganization plan and its reliance on the proposed bank loan. *Cf. Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993), remanding for hearing in light of numerous questions concerning the applicant's continuing financial qualifications.

[7] Capitol City filed a Response to Order on July 21, 1993; Williams filed a Request for Extension of Time on July 22, 1993 and a Reply to Response to Order, on August 2, 1993; Capitol City filed a Reply and a Petition for Leave to File Reply on September 1, 1993 and a Supplement to Reply on September 10, 1993; and Williams filed Comments on Unauthorized Reply of Capitol City on September 10, 1993. By his Request for Extension of Time, Williams sought a one-week extension of time in which to respond to the Response to Order. Pursuant to 47 C.F.R. § 1.4(h), however, Williams timely filed his Reply on August 2, 1993. The request for an extension of time is therefore moot and will be dismissed. As to the September 1, pleading filed by Capitol City, we find good cause to consider Capitol City's response because of the seriousness of the matters raised in Williams' August 2, 1993 Reply to Response, despite the facts that the General Counsel's Order did not authorize its filing, that Capitol City waited almost 30 days (twice the original filing period specified by the General Counsel's Order and nearly four times the time period accorded for Williams' responsive filing) before filing its reply, and that it did not explain this delay. See *Opal Chadwell*, 4 FCC Rcd 1215, 1216 ¶ 11 (1989). We will therefore grant Capitol City's September 1, 1993 Petition for Leave to File Reply.

[8] It appears that Malvin Patterson's financial position has declined only slightly since 1988. In this respect, the 1988 financial statement reflects a net worth of $790,654, which includes $19,578 in cash, $48,000 in notes receivable, $23,166 in stocks and bonds, life insurance with a cash surrender value of $10,000, personal property and equipment valued at $103,750, a business interest worth $20,000, and real estate valued at $727,000. In contrast, the June 1993 statement reflects a net worth of $787,607, real estate valued at $747,000, $14,375 in cash, $5300 in government securities, $1070 in other stocks and bonds, a business interest worth $20,000 as well as $82,750 in automobiles, equipment, furniture and other personal property. By its September 1, 1993 filing Capitol City acknowledges the inadvertent omission from the June 30, 1993 financial statement of an obligation of approximately $1850. Taking the unreported debt into account, the June 30, 1993 financial statement reflects a net worth of approximately $785,757.

[9] Attached to Williams' Reply is a Deed of Trust, dated November 26, 1991, in the amount of $2500 on Lot 14, Block 30, Beverly Heights Addition, which indicates that the Deed is secondary to a prior lien of April 1991. Williams notes that, while listing six properties owned by Malvin and Mae Patterson that are subject to mortgages, the financial statement does not list the amount of the mortgages, or whether there are second

bank letter is insufficient on its face and that, even if sufficient to demonstrate reasonable assurance, the letter would not establish Capitol City's financial qualifications at the time of certification. He therefore requests that we dismiss Capitol City's application or at least designate it for hearing on appropriate financial, false certification, and misrepresentation /lack of candor issues.

6. Capitol City admits, in a reply pleading filed on September 1, 1993, that Malvin Patterson did not have at the time of certification and does not now have sufficient net liquid assets to cover his $275,000 commitment to Capitol City, as that term is defined by the Commission. It denies, however, that Ronald Patterson falsely certified the applicant's financial qualifications or intentionally deceived the Commission as to Malvin Patterson's ability to fund Capitol City's application, or that Capitol City is, or ever was, financially unqualified. It relies in this regard on a statement under penalty of perjury, dated August 26, 1993, in which Ronald Patterson explains that he meant "net liquid assets" to include his father's "borrowing capacity," which, in his mind, reflects the ability to obtain a loan based upon all of his assets (including the real estate). Capitol City urges that, taking into consideration Malvin's total capacity to borrow, Ronald's statements concerning his father's liquidity were reasonable and accurate, and that they do not raise a material question of fact warranting the addition of a misrepresentation issue.

7. Turning to the question of its financial qualifications. Capitol City submits a declaration under penalty of perjury, dated August 31, 1993, from Malvin Patterson purporting to clarify certain discrepancies in the statements (that were raised by Williams' Reply)[10] and to corroborate the value of the real estate listed therein.[11] Based upon that statement, Capitol City claims that the 1988 and 1993 financial statements reflect non-liquid assets that are adequate to support a conclusion under Commission precedent that Malvin Patterson can raise the funds necessary to meet his $275,000 loan commitment to Capitol City.[12] Finally, it submits a declaration under penalty of perjury, dated August 31, 1993, from Mae Patterson, joint owner of the assets listed on the statements, indicating her awareness of, and her consent to, her husband's proposed loan to Capitol City.

DISCUSSION

8. Having examined the pleadings before us in accordance with the standards for specifying a hearing, see *Astroline Communications Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); 47 U.S.C. § 309(e), we find that there are substantial[13] and material[14] questions as to whether Capitol City was financially qualified at the time of certification and whether Ronald Patterson made misrepresentations to the Commission or lacked candor concerning his father's ability to fund the application. We therefore designate appropriate issues against Capitol City and remand the proceeding for further evidentiary hearings.

9. *Financial Qualifications:* Non-liquid assets such as real estate may, as Capitol City alleges, provide reasonable assurance of financial qualifications, but only if the claimed value of those assets is adequately substantiated and if the assets are several times the value of the cash which such assets are relied upon to yield.[15] Neither financial statement satisfies Capitol City's burden of showing that at the time of certification its purported lender had the necessary financial resources to provide the $273,000 that Capitol City estimates it needs for construction and initial operation of the station.[16]

10. The 1988 financial statement allegedly reviewed by Ronald Patterson before certification reflects that at that time Malvin Patterson had a net worth of $790,654, the bulk of which consisted of non-liquid assets (including real estate allegedly valued at $727,000). Capitol City has not

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trusts or other liens or other encumbrances against any of the properties listed. According to Williams, it is impossible to determine whether the Beverly Heights property is even one of the six that are listed as being mortgaged.

[10] The statement under penalty of perjury from Malvin Patterson acknowledges that the Deed of Trust, discussed at n.9 supra, was inadvertently omitted from the 1993 financial statement, explains the circumstances surrounding the unreported Deed of Trust (which involved two loans totaling $5,000 from the Department of Housing with a current unpaid balance of $1,850), and indicates that this omission caused him to reexamine the June 1993 statement, which is otherwise accurate. Declaration of Malvin Patterson at 1-3 ¶ ¶ 4-6. Malvin Patterson's statement also contains an itemized ' list of properties that are subject to mortgages or other encumbrances, which corresponds roughly to the total amount of "Liens on Real Estate" reflected on the 1993 Statement. *Id.* at 7.

[11] Malvin Patterson verified that he separately estimated the market value of each parcel of land listed on his financial statements. He explains that those values were derived by observing sales of comparable properties in the same general area and by discussing the properties with local, experienced realtors who informally appraised the various properties. Declaration of Malvin Patterson at 1 ¶ 3.

[12] Capitol City submits that the net worth to need ratio is approximately 2.86 to 1, which is greater than the 1.5 to 1 ratio found to be acceptable in *Dodge-Point Broadcasting Company*, 11 FCC 2d 751 (1968). It notes that the net worth-need ratio in *Opal Chadwell*, 4 FCC Rcd 1215 (1989), was only 1: 1, a fact not cited by the Commission in concluding that questions raised by conflicting real estate appraisals warranted the addition of a financial issue. Citing *Christian Children's Network*, 101 FCC 2d 612, 614 ¶ 5 (1985), Capitol City further urges that the net worth-need ratio is irrelevant here because of the bank loan.

[13] A question is substantial if the totality of the evidence raises sufficient doubt on the matter as to require further inquiry. See *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). See also *United States v. Messerlian*, 793 F.2d 94, 96 (3rd Cir. 1986).

[14] A material question is one that has legal significance or that affects the outcome of the litigation. See *Lipsett v. University of Puerto Rico*, 637 F. Supp. 789, 799 (D.P.R. 1986).

[15] *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.7 (1991), citing *Coastal Bend Family TV, Inc.*, 94 FCC 2d 648, 656 ¶ 12 (Rev. Bd. 1983); *United Artists*, 4 RR 2d 453, 458-59 ¶ 12 (Rev. Bd. 1964) (financial qualifications issue not warranted where a small amount of money must be obtained from a large amount of non-liquid assets). See also *Real Life Educational Foundation of Baton Rouge*, 8 FCC Rcd 2675, 2676 ¶ 9 (1993), and the cases cited therein.

[16] Attached to Capitol City's September 1, 1993 pleading is an unredacted copy of the July 1988 commitment letter reflecting that Malvin Patterson has agreed to lend $275,000 to fund Capitol City's proposed station. Previously Capitol City had not, as Williams noted in its Reply, disclosed the exact amount of the commitment from Malvin Patterson. Reply, at n.3. Despite Williams' claims, we do not find, based upon the pleadings before us, that Capitol City's previous failure to disclose the amount of the proposed loan warrants further inquiry at this time.

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met its burden of showing that these assets were readily convertible into cash at the time of certification.[17] Nor has it submitted valid appraisals or affidavits substantiating the claimed value of the real estate and the other illiquid assets at the time of certification, as is generally required where an applicant relies on illiquid assets as a basis of its financial qualifications.[18] See *Christian Children's Network*, 101 FCC 2d 612, 614 ¶ 5 (1985).

11. While purporting to rely on sales of comparable real estate and on informal appraisals given by experienced area realtors, Capitol City has not submitted, in connection with *any* property listed on either financial statement, any documentation of the allegedly comparable real estate transactions, sworn statements from realtors that Malvin contacted concerning his various real estate holdings or other evidence to corroborate the claimed value of those holdings. Although the Commission has, as Capitol City suggests, on occasion accepted something less than a formal appraisal, Malvin Patterson's blanket, unsupported recitation of the steps that he took in calculating the aggregate value of his various parcels of land falls far short of the "self-appraisals" that have been accepted in other cases.[19]

12. Even if the claimed values of the non-liquid assets had been adequately substantiated, Malvin Patterson had, according to the 1988 statement, less than $20,000 in cash and another $10,000 in life insurance that he could rely upon to meet his $275,000 commitment to Capitol City. With a net worth at that time of only $790,654, Malvin Patterson had to be able to generate the remaining $243,000 from non-liquid assets. The ratio of the claimed value of all of the non-liquid assets (including those that are subject to encumbrances) to the additional funds that the sale of those assets must yield ($760,654 to $243,000) would be roughly 3.13: 1, which is below what has been deemed to be acceptable in other cases.[20] In other words, the 1988 financial statement does not establish that at the time of certification Malvin Patterson had sufficient net liquid assets or readily convertible non-liquid assets to meet the financial requirements of the application.

13. Capitol City argues, however, that the 1993 financial statement and the 1993 bank loan demonstrate the lender's ability to liquidate his assets for the purpose of funding the station. But neither is probative of Malvin Patterson's ability to liquidate the assets in July 1988 when he agreed to fund Capitol City's application.[21] They therefore do not substantiate the validity of Capitol City's original certification, and in the absence of a showing of reasonable assurance at the time of certification, are not relevant to those questions concerning Capitol City's basic qualifications.[22]

14. Moreover, the 1993 financial statement lists a "contingent" liability of $20,000, which is identified as "Ronald Patterson (IRS)." This entry apparently refers to Malvin's pledge that "if either or both of these [tax] liens still exist after the grant of Capitol City's application and if either lienholder [the Internal Revenue Service or the State of Alabama] were to move against the radio station or its assets to satisfy Ronald's [unpaid tax] obligations, I will intervene to satisfy the lienholder so as to prevent the lienholder from seizing the station or its assets and from

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[17] Capitol City has the burden of showing that it is financially qualified. *Aspen FM*, 6 FCC Rcd 1602, 1603 ¶ 9 (1991). It has not demonstrated that $48,000 in accounts receivable are current or collectible in the short-term. *Port Huron Family Radio*, 5 FCC Rcd 4562, 4563 & n.5 (1986). Nor does the statement reflect that the $23,166 in stocks and bonds are readily marketable. *Vista Broadcasting*, 18 FCC 2d 636, 637 ¶ 3 (Rev. Bd. 1969).

[18] There is nothing to substantiate the $20,000 claimed value of Malvin's interest in the refuse company. See *Texas Communications*, 6 FCC Rcd at 5193 ¶ 14, citing *Opal Chadwell*, 4 FCC Rcd 1215 ¶ 6 (1989), in which the Commission held that the record must contain an appraisal substantiating the value of marketable securities and of a business interest; *Real Life*, 8 FCC Rcd at 2676 ¶ 11, in which the sheer magnitude of the purchase price of real estate holdings was supported by affidavit; *Port Huron*, 5 FCC Rcd at 4563 & n.5, in which the Commission reduced by one-third the fair market value of real estate in recognition of the fact that the net proceeds realized by sellers of real estate are generally less than the fair market value of the property.

[19] In *Dena Picture d/b/a Kaye-Smith Enterprises*, 98 FCC 2d 675 (Rev. Bd. 1984), cited by Capitol City, the applicant sought to rely on two parcels of real estate to demonstrate that he could raise an additional $114,000. Evidence that he had had a sales contract for $225,000 for both parcels that ultimately fell through and that a second parcel, a condominium, was on the same floor as a comparable unit that had been sold for $130,000 the year before was deemed adequate to support a claimed valuation of $200,000 for the two parcels.

[20] *Texas Communications*, 6 FCC Rcd at 5194 n.7, in which a ratio of slightly more than 2: 1 was insufficient; *Central Florida Communications*, 8 FCC Rcd 4128, 4130 ¶ 11 & n.8 (Rev. Bd. 1993), application for review pending, in which a ratio of 2.8: 1 was deemed to be substantially less than ratios allowed in other cases. See also *Cornwall Broadcasting Corp.*, 89 FCC 2d 704 (Rev. Bd. 1982), in which an asset to loan ratio of 16 to 1 was deemed acceptable; *Cannon's Point Broadcasting*, 93 FCC 2d 643 (Rev. Bd. 1983), in which an asset to loan ratio of 20 to 1 was acceptable; *International Broadcasting Co.*, 7 RR 2d 302 (1966), in which an asset ratio of approximately 53 to 1 was accepted. *Opal Chadwell*, 4 FCC Rcd 1215 (1989), in which the Commission added a financial issue based upon the absence of valid appraisals for non-liquid assets without regard to whether the value of those assets was several times the funds needed to finance the station, does not support Capitol City's claim that a ratio of 1: 1 would have been deemed acceptable had the value of the assets been substantiated with valid appraisals. *Dodge-Point Broadcasting Company*, 11 FCC 2d 751 (1968), cited by Capitol City, is also inapposite. That case has nothing to do with the net worth-funds needed ratio. In a case decided under *Ultravision's* one-year standard, the Commission reasoned that, where the applicant had sufficient liquid assets to cover the cost of construction and anticipated initial revenues of $46,000 based upon the initial experience of a nearby station, the station could be expected to realize revenues of at least $11,000 during the year, an amount sufficient to cover any shortfall, even assuming that real estate valued at $44,600 would sell for only $31,000.

[21] Therefore, Capitol City cannot rely on *Christian Children's Network*, 101 FCC 2d at 614 ¶ 5, where the net worth-funds needed ratio was held to be irrelevant because of the existence of a bank letter collaterialized by non-liquid assets. Nor is the 1993 bank letter an adequate substitute for valid appraisals or other probative evidence corroborating the value of the non-liquid assets listed on 1988 financial statement under *Rose Broadcasting Company*, 68 FCC 2d at 1246 ¶ 7. There, the applicant relied on real estate supported by a valid appraisal and a bank loan collaterialized by other non-liquid assets. Because there was an affidavit from the bank indicating that it had evaluated the assets, the loan was evidence of their value.

[22] The Commission has indicated that an applicant may not establish due diligence for a belated financial proposal in the absence of a demonstration by the applicant that he had reasonable assurance of financing at the time of certification. See, e.g., *Aspen FM*, 6 FCC Rcd at 1603-04 ¶ 13, and the cases cited therein.

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interfering with the operation of the station."[23] Notwithstanding Ronald Patterson's efforts to satisfy the tax liens without his father's help, the tax liens have not been fully paid and thus, by virtue of Malvin's intervention promise, are a current liability as long as they remain unsatisfied.[24] Not only should the resulting obligation have been reflected as a current liability on the June 1993 financial statement, but it materially increases Malvin Patterson's total funding commitment to Capitol City, a fact that Capitol City overlooks in claiming that Malvin has assets several times the amount needed to fund the applications.

15. Thus, there are substantial questions as to whether Capitol City's lender had sufficient net liquid or readily convertible illiquid assets to provide reasonable assurance of the availability of funding when Ronald Patterson certified that Capitol City was financially qualified, whether that certification was false, and whether it is financially qualified today.[25] This requires the specification of financial and false certification issues against Capitol City.

16. If the ALJ determines on remand that Capitol City was financially qualified at the time of certification and proceeds to consider its present financial qualifications, he may consider whether the 1993 bank letter, together with Malvin's June 1993 financial statement, are probative of his current ability to liquidate his assets, and thus of the applicant's current financial qualifications. In this respect, we in no way prejudge the questions that Williams raises concerning the legal sufficiency of the 1993 bank letter to provide reasonable assurance. We mean only to indicate that the ALJ has discretion to consider these matters.

17. *Lack of Candor/Misrepresentation:* Additional questions exist as to the candor of Ronald Patterson concerning his father's ability to fund the loan to Capitol City. Capitol City has claimed throughout this proceeding that the 1988 statement, which Ronald claims to have relied on in certifying the applicant's financial qualifications, reflected that Malvin had sufficient net *liquid* assets to fund the application. However, as reflected above and as Capitol City admits in its response, that statement clearly shows that Malvin's assets at the time of certification were largely illiquid and that he had almost no net liquid assets. This apparent lack of candor would warrant further inquiry even if it were ultimately concluded that Capitol City had adequately substantiated the asserted value and convertibility of those non liquid assets into cash at the time of certification and shown that those assets were several times the value of the amount of the proposed loan from Malvin Patterson so as to provide reasonable assurance that the required funds would be available.

18. In this regard, Ronald Patterson testified that, as a former bank president, he has a general knowledge of finance and that, having attended a workshop for broadcast applicants, he was aware of the Commission's financial requirements. He repeatedly represented that the 1988 statement established that his father had sufficient net liquid assets to fund the application. In a April 19, 1991 declaration, submitted in response to Williams' first Petition to Enlarge Issues, Patterson stated that "[he] was able to determine [from the 1988 financial statement] that [his] father had sufficient net liquid assets to provide Capitol with his proposed loan, and was able to certify that Capitol had sufficient net liquid assets available to it to construct its proposed facility and operate it for three months without revenue."

19. Patterson later explained, in deposition testimony taken on April 26, 1991, what he had meant by "net liquid assets" in the earlier declaration. He defined liquid assets as "[j]ust his cash availability, also his borrowing capacity, his unused borrowing capacity, his line of credit, his investment in stocks and bonds," and he defined "sufficient net liquid assets" for FCC purposes as "assets that were unencumbered that could be quickly converted to cash in excess of the amount that [the applicant] needed to build and operate this station for three months.[26] In an affidavit, dated August 26, 1993, Ronald Patterson explained that "borrowing capacity" was intended to include not only established lines of credit and other existing credit facilities but also his father's ability to borrow relying upon all of his assets as collateral (including real estate). Nonetheless, Patterson indicated at the deposition that he understood "net assets" to be assets after deducting liabilities. He testified again at hearing that in certifying Capitol City's financial qualifications he had assured himself that his father was sufficiently liquid to lend Capitol City the required funds. (Tr. 106).

20. Even assuming that Capitol City can adequately document the claimed value and convertibility of Malvin's stocks, bonds, and accounts receivable at the time of certification -- which the conclusory and undocumented 1988 statement from Malvin does not establish on its face -- he would have had $90,744 in cash and "liquid" assets, an amount clearly insufficient to meet $140,840 of liabilities reflected on the statement, let alone provide the $273,000 that Capitol City estimates it needs to construct and operate

[23] See Declaration of Malvin W. Patterson, Jr., dated April 28, 1993, that is attached to Capitol City's April 28, 1993 Further Opposition to Second Petition to Reopen the Record.

[24] Attached to Capitol City's Further Opposition to Second Petition to Reopen the Record is a statement under penalty of perjury, dated April 28, 1993, from Ronald Patterson acknowledging that he lost his job in October 1990, that he was out of work until February 1993, when he was hired as Project Director of the Shreveport Minority Business Development Center in Shreveport, Louisiana. Immediately after securing employment, Patterson entered into an agreement with the Shreveport Consumer Credit Counseling Services on March 12, 1993 to coordinate the retirement of his financial obligations, including his tax obligations.

[25] Williams suggests that, by the act of certifying the applicant's financial qualifications, Ronald Patterson affirmed that his father had sufficient net *liquid* funds to meet his commitment to Capitol City. We disagree. To certify, Capitol City had to have reasonable assurance at that time of "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue," as required by Form 301. See generally *Northampton*, 4 FCC Rcd at 5519 ¶ ¶ 15-16. Here Capitol City relies on a "committed source[] of funds" (i.e., Malvin Patterson). It may prevail on the false certification issue if it can show substantial and probative evidence on remand that at the time of certification Ronald Patterson had a good faith belief that the lender had the necessary financial resources -- whether in the form of liquid or non-liquid assets -- to meet his funding commitment to Capitol City.

[26] Deposition, at 132, 133-34.

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for three months plus the additional amount required by Malvin's pledge to protect the station and its assts against seizure. Thus, according to Ronald Patterson's own definition of "net liquid assets" – which did not expressly include real estate – Malvin Patterson clearly did not have "sufficient net liquid assets" to provide the necessary funds for Capitol City.

21. Capitol City offers no explanation for Ronald Patterson's apparent lack of candor regarding these decisionally significant matters, other than the self-serving statement of Ronald Patterson that he was relying on real estate, even though such reliance is contrary to accepted accounting practice and he did not explicitly include real estate when he was asked at deposition to define "net liquid assets." An ALJ may conclude, after hearing all of the evidence, that there was no intentional misrepresentation and thus no basis for disqualifying Capitol City.[27] However, we are unable to make that determination based solely on Patterson's self-serving, uncorroborated written declaration, particularly given the fact that Patterson is a former bank president, who testified that he is generally knowledgeable about financial matters and had attended a workshop dealing with the Commission's financial requirements. Thus, there are substantial and material questions, which cannot be resolved based upon the pleadings before us, as to whether Capitol City falsely certified its financial qualifications and whether Ronald Patterson intentionally deceived the Commission concerning his father's ability to fund the application. As these matters bear on Capitol City's basic qualifications, we remand this proceeding for further hearings on financial qualifications, false certification and misrepresentation/lack of candor issues against Capitol City.

ORDERS

22. ACCORDINGLY, IT IS ORDERED That the Application for Review, filed April 12, 1993, by Matthew Williams IS DENIED to the extent reflected herein and IS DISMISSED in all other respects.

23. IT IS FURTHER ORDERED That the Petition for Leave to File Reply, filed September 1, 1993, by Capitol City Broadcasting Company IS GRANTED; and that the Reply of Capitol City Broadcasting Company, tendered for filing on September 1, 1993, IS ACCEPTED.

24. IT IS FURTHER ORDERED, That the Review Board's Decision IS MODIFIED to the extent reflected above, that the Second Petition to Reopen the Record, filed on April 14, 1993, by Williams IS GRANTED to the extent reflected herein and IS DISMISSED in all other respects, that the Motion for Extension of Time, filed on July 22, 1993, by Williams IS DISMISSED as moot, and that this proceeding IS REMANDED to an Administrative Law Judge for further hearings and the preparation of a Supplemental Initial Decision on the following issues:[28]

(a) To determine whether Capitol City was financially qualified to be a Commission licensee at the time of certification;

(b) To determine whether Capitol City is presently financially qualified to be a Commission licensee;

(c) To determine whether Capitol City falsely certified its financial qualifications to construct and operate its proposed FM station at Longview, Texas;

(d) To determine whether Capitol City made misrepresentations lacked candor before the Commission concerning its financial qualifications; and

(e) To determine whether, in light of the evidence adduced under the foregoing issues, Capitol City is qualified to be a Commission licensee.

25. IT IS FURTHER ORDERED, That the burden of proof SHALL BE UPON Capitol City Broadcasting.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[27] An intentional misrepresentation about matters of decisional significance is a basis for disqualification. See, e.g., *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1510 ¶ 22 (1991) (misrepresentation issue added where the pleadings reflected a disturbing pattern of concealment and half-truths raising a substantial and material questions as to whether the applicant had breached its duty of candor). See generally, *RKO General v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

[28] Pursuant to the requirements of 47 C.F.R. § 1.229 (e) and the procedures set forth in *Hearing Reform Report and Order*, 6 FCC Rcd 157, 161 ¶ 30 (1990), reconsideration granted in part, 6 FCC Rcd 3403 (1991), we direct Williams to file a motion concerning discovery within 10 days from the release date of this memorandum opinion and order. Absent good cause, any such discovery shall be completed within 30 days of the ALJ's action on such motion.

EXHIBIT 3

MARINE MIDLAND BANK, N.A.
520 Seneca Street
Utica, New York 13502

November 29, 1993

Mr. Kenneth Roser
Professional Media Services, Inc.
5819 Graham Road
Utica, New York 13502

Dear Ken:

Thank you for drawing down on the $100,000 line of credit established in April, 1992. We appreciate your business.

If we can be of further service, please let us know.

Sincerely,

Anthony F. Munski
Assistant Vice President

AFM:jp