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

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

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

To: The Review Board

REPLY BRIEF

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SUMMARY

The basic and comparative qualifications of Wilburn Industries, Inc. ("Wilburn") have been challenged in Exceptions filed by Ohio Radio Associates ("ORA"), Shellee F. Davis ("Davis") and ASF Broadcasting Corporation ("ASF"). ORA alleges that a site availability issue and an "EEO abuse of process" issue should have been specified against Wilburn, while Davis alleges that a financial issue should have been specified. The facts demonstrate, however, that Wilburn obtained reasonable assurance of the availability of its site prior to the filing of its application, that Wilburn has not abused the Commission's processes, and that no financial issue should be specified against Wilburn. The challenges to Wilburn's integration proposal by ORA and ASF are equally specious. The Judge below properly gave Wilburn credit for integrating 100% of its attributable ownership into the day-to-day management of its station. Finally, to the extent that the recent decision in Susan M. Bechtel v. FCC leads to the adoption of new comparative criteria or a different weighing of existing criteria, the parties herein must be given an opportunity to modify their comparative showings in light of such new or revised criteria.

TABLE OF CITATIONS

Susan M. Bechtel v. FCC, Case No. 92-1378
(D.C. Cir. 1993). 1, 15, 16

Genesee Communications, Inc., 3 FCC Rcd 3595
(Rev. Bd. 1988) 3

Progressive Communications, Inc., 61 RR2d 560
(Rev. Bd. 1986) 3

Revised Processing of Broadcast Applicants,
72 FCC 2d 202 (1979).11

ARGUMENT

A. Introduction

In its December 20, 1993 Exceptions and Brief, Wilburn Industries, Inc. ("Wilburn") showed that it is fully qualified to become a Commission licensee and is comparatively superior to every other applicant in this proceeding.¹ Two other applicants in this proceeding, Ohio Radio Associates ("ORA") and Shellee F. Davis ("Davis"), have attacked Wilburn's basic qualifications, while ORA and ASF Broadcasting Corporation ("ASF") allege that Wilburn should not have received 100% integration credit for the integration of principal Charles Wilburn. A review of the record evidence demonstrates, however, that each of their arguments is entirely specious.

B. Site Availability Issue

At pages 23-24 of its Exceptions, ORA claims that a site availability issue should have been specified against Wilburn because the owner of the tower and site which Wilburn proposes to use allegedly did not give Wilburn "reasonable assurance" of such use. According to ORA, the letter from Carl Fry, the owner's

¹ Wilburn is aware of the recent release of Susan M. Bechtel v. FCC by the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 92-1378, decided December 17, 1993), but will address the arguments made by the other parties with regard to its comparative qualifications pending further guidance from the Commission.

authorized representative, merely indicated that he would be willing to discuss the possibility of a lease in the future.²

ORA, however, grossly mischaracterizes the letter in question. That letter in fact states that,

this correspondence is to confirm that should the Federal Communications Commission award you the construction permit, Mid-Ohio Communications, Inc., the former licensee of WBBY-FM, is willing to negotiate appropriate leases with you for certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies in the amount of Six Thousand Dollars (\$6,000) per month.

The letter goes on to identify the specific site and other property in question, and recites that such leases would commence upon grant of a construction permit by the Commission.

Thereafter, Fry recites that his correspondence "conveys an intent to negotiate ... and does not in and of itself constitute lease agreements" and that there is "no guarantee" that all final terms will be agreed upon. The letter also was expressly conditioned upon Wilburn's providing a satisfactory financial showing to the agent (which Wilburn did). That is, Fry stated that it is Mid-Ohio's intention to lease the site, and he identified both the assets to be leased and the basic terms of such lease. He then cautioned that his letter did not itself

² The site, tower and equipment in question are owned by Mid-Ohio Communications, Inc. ("Mid-Ohio") the former licensee of Station WBBY-FM, Westerville, Ohio. The parties to this proceeding have applied to replace that station, and Wilburn proposes to use the assets of the now-silent station upon grant of its application.

constitute a binding, legal commitment, and that, notwithstanding Mid-Ohio's intention, a lease might not be finalized if the parties did not agree on all final terms.

As is obvious from the foregoing, Fry therefore has provided the reasonable assurance of site availability required by the Commission. There has been a meeting of the minds resulting in a firm understanding as to both the site's availability and the key terms upon which such site will be made available. See Genesee Communications, Inc., 3 FCC Rcd 3595 (Rev. Bd. 1988); Progressive Communications, Inc., 61 RR2d 560 (Rev. Bd. 1986). The cases cited by ORA, where site owners had not reached a decision to lease their land (contingent upon the agreement of final terms once a permit is issued) and expressed no more than a willingness to consider the matter in the future, are patently inapposite.

C. "EEO Abuse of Process" Issue

ORA also contends, at pages 22-23 of its Exceptions, that the Judge erroneously denied its petition to add an "EEO Abuse of Process" issue against Wilburn. According to ORA, such an issue is required because Wilburn did not initially submit a Model EEO Program when it filed its application and later submitted a Model EEO Program in an amendment after reviewing the Model Programs of other applicants and specifying some of the same recruitment

sources.³ This conduct on the part of Wilburn, ORA claims, demonstrates a disregard of the Commission's filing requirements and of the Commission's EEO policies.

As recognized by the Judge below, ORA's argument is, at best, frivolous. Wilburn's principals reasonably chose not to submit an EEO program with their application until they were sure of what they were doing and, as recognized by the Commission staff, the omission of an EEO program does not render an application unacceptable for filing. Indeed, the filing of a later amendment to include an EEO program was entirely consistent with the Commission's filing requirements.

Further, there is nothing particularly unique about any applicant's EEO program: The FCC has drafted the multi-page model and applicants merely fill in the blanks, listing minority and female organizations, schools with significant minority or female populations, and media with significant circulation among local minority and female residents. Local groups, such as the

³ More specifically, Wilburn's pre-hearing deposition testimony (attached to Wilburn's 1993 Opposition to Motion to Enlarge), showed that Wilburn's principals, proceeding without counsel, did not submit a Model Program with their application because (1) they were unsure of what was required, and (2) they learned that an application would not be returned or dismissed if it lacked such a program. See also Hearing Tr. 299-300. Wilburn thereafter reviewed programs which had been filed and, seeing what was required, needed to go no further in order to complete its own program. See also Hearing Tr. 322-323.

local NAACP chapter mentioned in the Wilburn depositions, may be listed by several applicants, and there is no special merit or magic in conducting "independent research" in the Yellow Pages or at the Chamber of Commerce to determine what groups, schools or media may exist in a certain area. What concerns the Commission is the applicant's awareness of such recruitment sources and its actual use of such sources when it seeks to fill positions on its staff.

Wilburn's EEO program demonstrates that it is aware of local groups, schools and media, regardless of how Wilburn may have gone about identifying them for its model EEO program. Moreover, absolutely no question has been raised about Wilburn's willingness to contact such groups, schools and media once it receives a permit and begins to assemble a staff. There thus is no basis for ORA's claim that Wilburn has disregarded the Commission's EEO policy in the past or will disregard such policies in the future. ORA's attempt to manufacture a qualifying issue against Wilburn therefore must be rejected in all respects.

D. Financial Issue

Davis alleges at pages 4-7 of her Brief that a financial issue must be added against Wilburn because the letter from Carl Fry, Mid-Ohio's agent, does not unequivocally state that all of

the equipment used by WBBY-FM will be available when Wilburn is ready to use it. Davis argues that Wilburn's failure to include the replacement costs of such equipment therefore renders Wilburn financially unqualified. Davis asserts that a financial issue also should have been added against Wilburn because Wilburn did not write down its budget before it filed its application and its two principals did not review each other's balance sheets before they each executed its application.⁴

⁴ Davis also alleges -- for the first time -- that one principal, Bernard Wilburn, did not have liquid assets above current liabilities sufficient to meet his commitment to the applicant. No party raised this matter below and, indeed, one basis for the Judge's refusal to add a financial issue below was the fact that no party had alleged that Wilburn could not meet its costs of construction and operation. Davis's improper argument therefore should be stricken because it seeks to raise an entirely new matter before the Board. The impropriety of such conduct by Davis, who treats Exceptions as if they were a belated petition to enlarge issues, and the disruptive effect such conduct would have on the orderly conduct of this proceeding are manifest. Had Davis raised the matter below, Wilburn would have been able to show that Charles Wilburn had agreed to loan funds to his son if it became necessary to do so when a permit was granted by the Commission. Wilburn also would have been able to explain that at the time of their application their law firm expected to shortly settle a lawsuit which would render any such loan unnecessary, because Bernard's 50% share of the contingent fee would far exceed his commitment to the applicant. Indeed, such settlement was reached. Thus, had Davis raised the matter in a timely fashion and in a proper vehicle, Wilburn would have demonstrated that it was, and is, financially qualified to become a Commission licensee. At this point, however, her "exception" should be stricken from the record as contrary to the Commission's procedural rules and disruptive of the orderly conduct of this proceeding.

These arguments, too, are specious. As an initial matter, Davis misreads the plain language of the Fry letter. Thus, Fry states in his letter, without reservation or limitation, that,

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

Fry then stated that,

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

That is, Fry did not thereby negate his preceding statement that the equipment used by WBBY-FM would be available under the lease; he merely made no representation about the completeness of the inventory list. Nothing in his letter indicates that the equipment, listed or not, might not be available. Moreover, Wilburn certainly knew that, listed or not, all the equipment offered for lease was sufficient to operate WBBY-FM, because WBBY-FM in fact had operated using such equipment. Davis's argument therefore is entirely without foundation.⁵

The other arguments proffered by Davis are equally specious. In fact, the documents produced and deposition testimony provided by Wilburn in the course of discovery show that Wilburn's

⁵ Davis's argument also is remarkable, because she herself relied on Fry's letter when she initially certified that she was financially qualified.

principals took a series of steps to assure themselves that they were financially qualified to construct and operate their proposed station before they executed and submitted their application to the Commission.⁶ Planning to file an application for a station to replace WBBY-FM, Charles Wilburn learned that all of the real estate, transmission and studio equipment, office space and furnishings, and everything else of significance which was used by that station in its operations would be available for lease from the prior licensee, Mid-Ohio. (Wilburn Tr. 23, 36.) Mr. Wilburn therefore went to the office of Carl Fry, Mid-Ohio's representative, who issued Mr. Wilburn a letter assuring him that Mid-Ohio was willing to negotiate a lease with him which would make such real estate, equipment and other property available to Wilburn for \$6,000 per month. (Id.) Attached to the letter was a detailed multi-page inventory of the equipment and furniture owned and used by Mid-Ohio when it operated the station. This letter of assurance was conditioned upon Wilburn providing a showing of its financial qualifications to Mid-Ohio within the following sixty days, i.e., by February 22, 1992. (Id.) Accordingly, Charles and Bernard Wilburn, who intend to personally finance their station, sent their personal financial statements to Mr. Fry, satisfying that condition.

⁶ The documents referenced in the arguments by Davis and Wilburn are attached to Davis's August 19, 1993 Motion and Wilburn's September 3, 1993 Opposition to Enlarge Issues. The transcripts of the deposition testimony referenced by Wilburn are attached to its September 3, 1993 Opposition.

Charles Wilburn also met with Ardeth Frizzell, General Manager of WBBY-FM, who told him that it cost \$30,000 per month to operate WBBY-FM. (Wilburn Tr. 17.) Although obtaining this figure was a reliable, pragmatic means of determining the money actually required to operate the facilities in question, Wilburn did not simply adopt it. He considered the payroll needed for the staff he had in mind, increased Ms. Frizzell's figures based on his own plans, factored in lease costs and other expenses such as utilities and music royalties, and reached a figure of \$50,000 per month, significantly higher than the figure provided by Ms. Frizzell.⁷ (Wilburn Tr. 17, 21.) He then drafted a memorandum to Bernard Wilburn outlining and explaining his cost estimates before Wilburn's application was filed with the Commission. Then, once Charles and Bernard Wilburn were satisfied that they had reasonably ascertained what funds would be required (i.e., \$150,000) and knew that they personally possessed the funds to meet such costs, they each executed their FCC Form 301 application and filed it with the Commission.

As reflected in the above summation, there is no basis for the arguments proffered by Davis. First, insofar as a written budget is concerned, a budget is necessary because the Commission

⁷ Charles Wilburn has extensive experience in overseeing business operations as a legal guardian or fiduciary, in connection with the services he provides to the clients of his law firm. He also is a CPA and has represented businesses throughout his legal career.

wants to be sure that an applicant has ascertained what equipment is necessary, what such equipment will cost and what its other costs of construction and operations are likely to be. In this case, there can be no question that Charles Wilburn undertook such an exercise, whether or not he then reduced such estimates to writing. The basic, underlying policy of the Commission, to preclude specious applicants, therefore is satisfied. Moreover, if contemporaneous documents identifying such costs (i.e., a "budget") must exist, Carl Fry's letter to Charles Wilburn and Charles Wilburn's written report to his son concerning their anticipated costs of operation plainly satisfy such a requirement. Davis's contention that an issue must be added intentionally ignores such documentation and therefore must be rejected.⁸

Second, Davis cites no case and gives no reason why each principal of Wilburn had to review the financial statement of the other before they both executed their application. Moreover, in this case, the two principals are a father and son who have shared the same business and income, and who are intimately familiar with each other's income, receivables and overall

⁸ Even if, arguendo, such documents for some reason are not deemed to be a "budget", a finding to that effect would not undermine the basic fact which they demonstrate: Wilburn ascertained, evaluated and wrote down the construction and operating costs of his proposed facility before certifying that funds were available to meet such costs. To specify an issue in these circumstances would elevate form over substance.

financial position. In any event, Charles Wilburn had agreed to lend any necessary sums to his son, so that his signature alone would have sufficed, based upon his personal knowledge of his own financial position.

In sum, Wilburn reasonably and in good faith satisfied every fundamental concern which the Commission may have about the financial qualifications of the applicant before it. Even if, arguendo, Wilburn may have failed to completely satisfy a technicality regarding documentation -- which in this case raises no question about the timeliness or accuracy of its actual cost estimates or ability to meet its estimated costs -- no issue should be added, because the Commission does not waste its time examining such immaterial missteps. Rather,

The test to be used regarding the nature of the showing required to reopen the question of the adequacy of the applicant's finances will be ... limited to a showing of misrepresentation or gross omission of some decisionally significant item which would render the proposal decisionally defective.

Revised Processing of Broadcast Applicants, 72 FCC 2d 202, 222 (1979). Davis's arguments to the Board, like her arguments below, sadly fail to meet this test.

E. The Comparative Issue

Both ORA and ASF have contended that Charles Wilburn should receive no credit for his integration proposal. ORA contends in

this regard that: (1) a document on file with the Ohio Secretary of State identified Bernard Wilburn, Wilburn's non-voting shareholder, as Secretary of the applicant corporation; (2) Charles Wilburn intends to retire in early 1994; (3) Bernard Wilburn concedes that Charles has only "negative control" of the applicant; and (4) Bernard shares control of their law firm checking account which has been used to pay Wilburn's expenses to date. For its part, ASF asserts that Wilburn's integration proposal should not be credited when "viewed in totality" because it is more likely that Charles Wilburn will retire and leave the management of the station in the hands of an experienced broadcaster, Nelson Embry.

ORA's arguments misrepresent the record evidence; ASF's speculative arguments have no basis in, and are contradicted by, the record evidence. Thus, the document filed with the Ohio Secretary of State was filed by Wilburn when it had but a single class of stock in order to convert that corporation to one which would have two classes of stock, voting and non-voting. As Charles Wilburn clearly explained at hearing, Bernard Wilburn executed the notice to the State of Ohio in his capacity of Secretary of the corporation as it was initially incorporated, thereby changing its status thereafter to one where he would hold no office or voting stock. (Tr. 327.) Afterwards, he held no corporate office and had no role in the conduct of the company business, while all subsequent filings with the State included no

reference to any such position or activity on his part. (Tr. 327.)

Similarly, Charles Wilburn did not testify that he would terminate all business activities in 1994, when he reaches age 65. Rather, he consistently testified that he intends to retire from the practice of law and find some other, new activity to occupy his time and energy. (Tr. 331-332, 340, 345.) Thirty years of law is enough, he explained, and he no longer needs the income from the practice (or a radio station) to support himself. (Tr. 319, 322.) Bernard Wilburn also did not "concede" or otherwise indicate that his own 50% equity interest in the company limited the control exercised by his father, the corporation's sole voting shareholder. To the contrary, reference to the transcript cited by ORA plainly reveals that, in responding to a question about his own stock, he explained that, "It [Bernard's equity] is as much as his [Charles's equity]. It [Bernard's equity] does not control what happens." (Tr. 361.)

ORA's final claim is equally fallacious. Charles and Bernard Wilburn are each 50% partners in their law firm, have a 50% interest in the firm's funds, are each obligated to pay 50% of Wilburn's pre-grant expenses, and pay Wilburn's expenses from the firm account. That Bernard Wilburn has the right to write checks on the firm's account to pay for other expenses which he, his father or the firm incur does not give him control of, or

remove his insulation with respect to, the applicant in this proceeding. Once Wilburn's application is granted and its business and operations commence, the permittee will establish a separate account which only Charles Wilburn will control, but to require that the applicant do so at this point would be nonsensical.⁹

While ORA distorts the evidence, ASF merely argues, without any basis in the record, that the sworn testimony of Charles Wilburn should not be believed because it is unlikely that he will do what he has said he will do. There is no evidence, however, to indicate that Charles Wilburn has been untruthful, and there is nothing inherently incredible about someone choosing to occupy himself in another vocation (or avocation) after he no longer wishes or needs to engage in the practice of law. Moreover, contrary to ASF's argument, Charles Wilburn has not arranged for Nelson Embry to have a significant, managerial role at the station. At most, there have been some general discussions (which have not included such basic matters as the hours to be worked and compensation to be paid) about his being

⁹ Presumably, ORA would require that Bernard and Charles each withdraw from their firm's account one-half of the amount of the engineering or legal fees due, deposit such sums in their personal accounts, withdraw such sums from their personal accounts and deposit them in a separate Wilburn Industries account, and then have Charles Wilburn write a check on that account to satisfy the outstanding bill. Rather than go through such charade, Charles has written checks on the firm's account to meet the applicant's expenses.

retained as a consultant-advisor who may thereby provide advice to Mr. Wilburn based on Embry's years of experience. (Tr. 311, 313-361.) Contrary to ASF's strained theory, these discussions of possible assistance do not mean that Embry will manage the station or that Wilburn will be incapable of or unwilling to himself oversee the day-to-day activities of his business.

F. The Bechtel Decision

As noted above, the U.S. Court of Appeals has ruled in Susan M. Bechtel v. FCC that the Commission's implementation of the integration criterion under the standard comparative issue has been arbitrary and capricious. Several of the parties have alleged that, as a consequence, their superior coverage should lead to a grant of their applications under the comparative issue. Such arguments are premature and the Board cannot in any event adopt such conclusions absent further guidance from the Commission. Wilburn nevertheless wishes to note that where new comparative criteria are adopted or the weight and significance of existing criteria are modified, all parties should be afforded an opportunity to amend their applications and/or to modify their existing proposals as may be desirable or appropriate under the Commission's new standards. Fairness, the Commission's current procedures which permit amendments as of a "B" cut-off date, and the due process requirement that all applicants be given prior

notice of the standards by which they are to be judged mandate that such a procedure be adopted.

G. Conclusion

As shown in Wilburn's Exceptions and Brief, Wilburn is fully qualified to become a Commission licensee and is best qualified among the applicants on a comparative basis. The arguments advanced by other parties to support their contentions to the contrary mischaracterize or ignore the record evidence. Wilburn's application therefore should be granted. If the ruling in Susan M. Bechtel v. FCC precludes such grant at this time, Wilburn must be afforded an opportunity to comply with and address whatever new or revised criteria the Commission may adopt.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 4th day of January, 1994, I caused copies of the foregoing "Reply Brief" to be delivered by first class mail, postage prepaid, to the person named below:

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