

33. Shellee Davis is an experienced businesswomen. The Commission's integration criteria does not require prior broadcast experience, nor does it require even prior knowledge or expertise of the local broadcast industry, nor does it require applicants to prepare "plans," "projections" or "formats" in advance of a start-up which may not occur for months or years in the future. Broadcasting is a sales medium. Ms. Davis successfully built Britt Business Systems into a thriving business without a prior experience in the office machine sales industry. Nothing prevents her from doing the same in the radio sales industry. Nothing in ORA's inaccurate recitation of the facts in any way detract from Davis' ability to fulfill her pledge to work full-time at her proposed facility. Thus, the Review Board should reject ORA's misguided arguments in this regard, as well.

formats can freely change). ORA also claims that Davis does not "know anything about the economic state of radio in general." ORA Exceptions ¶ 19. Ms. Davis testified, however, on the very pages to which ORA refers that she is fully aware of the uncertain nature of the radio business. TR 381-82.

ORA notes that as Davis testified, she does not know the specific profitability of FM radio stations in the Columbus area or the specific radio revenues for the local market. ORA Exceptions ¶ 19. Putting aside the question of whether such information even is available, what ORA fails to note, however, is that Davis is already fully-entrenched in the Columbus business community. As ORA (as well as all other applicants) conveniently fail to include in their proposed findings, Davis is well established and has been successful in the past in the Westerville-area business community. Thus, the record reflects Davis is fully familiar with the current state of the Columbus business community even without developing specialized studies of "revenue projections" or overall advertising revenues for the Columbus market. With the possible exception of ASF's Ms. Frizzell, Ms. Davis singularly is the only applicant with a hands-on knowledge of the businesses and the economy comprising the Westerville-Columbus market. It is worth noting that the record also is devoid of any evidence that any other applicant has "done a market analysis as to a format" for the station, "research as to [the station's] potential profitability," "revenue projections," "the overall radio advertising revenues for the local market," "the profitability of FM radio stations in the Columbus market" or "the economic state of radio in general." Cf. ORA Exceptions at 5. Those matters all deal with the profitability of radio facilities. The Commission is not the guarantor of the financial success of its licensees. That is a judgement to be made by the applicants and the marketplace. Triangle Publications, Inc., 29 F.C.C. 315, 318 (1960).

ORA also claims that since deciding to apply in December 1991, Ms. Davis "has done very little to learn about the radio industry," claiming that all she has done was to read a book published by the National Association of Broadcasting and to tour WBBY-FM facilities. ORA Exceptions ¶ 20. ORA again fails to accurately recite the facts contained in the record. As the record shows, she has been consulting with Ms. Scheimer, who was a former employee of WBBY-FM, she has toured and consulted with station personnel at another area Ohio radio station, WROU(FM), and has toured their facilities. TR 417. This is in addition to her day-to-day attempts to familiarize herself to the current broadcasting efforts of the existing Columbus-area stations. TR 412.

Finally, ORA makes the claim that "Davis does not know if she will have a salary at the proposed Westerville station" (ORA Exceptions ¶ 20), implying that she is ignorant of her own proposal. What her testimony actually states is that she "hopes [to have a salary], but there's a possibility that she may not" (TR 387) and that she has budgeted a salary for herself of \$30,000. TR 388.

No Site Availability Issue Is Warranted

34. Davis, as did WII, Ringer, and ASF, applied for Channel 280A at the transmitter site previously utilized by Station WBBY(FM) -- the same site ORA designated when initially submitting its application to the Commission. ORA concedes that Davis is the recipient of a letter from Mid-Ohio. The letter never has been revoked. The letter specifically states:

Mid-Ohio Communications hereby grants you the authority to specify WBBY-FM's transmitter location in your FCC application. We wish you the best of luck in your application for licensure being prepared for filing with the Federal Communications Commission.

Exhibit 1, Att. A. Nevertheless, ORA argues that the documents from Mid-Ohio represent only a "willingness to deal" on the part of the tower site owner" which does not constitute "reasonable assurance." ORA Motion at 1.

35. ORA's Motion properly was denied. MO&O, FCC 93M-395 (June 24, 1993). As the Review Board has stated:

reasonable assurance may be acquired in numerous ways, [and] there must at least be a meeting of the minds resulting in some firm understanding as to the site's availability.

Genesee Communications, Inc., 3 FCC Rcd 3595, ¶ 4 (Rev. Bd. 1988). Similarly, the Commission itself has stated:

We have long held that a broadcast applicant need not have a binding agreement or absolute assurance of a proposed site. What an applicant must show...is that it has obtained reasonable assurance that its proposed site is available, with some indication of the property owner's favorable disposition toward making an arrangement with the applicant, beyond a mere possibility.

National Innovative Programming Network, Inc. of the East Coast, 2 FCC Rcd 5641, 5643 ¶ 11 (1987).

As the Commission has even more recently stated:

It bears emphasis that the Commission's reasonable assurance standard is a liberal one, reflecting an underlying policy judgement that it would not serve the public interest to add to the cost and risk that applicants incur by requiring them to enter into binding commitments for the use of proposed transmitter sites. See Alden Communications Corp., 3 FCC Rcd 3937, 3938 ¶ 8 (1988). All that is ordinarily necessary for reasonable assurance is some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated, and that he would give notice of any change of intention.... In other words, the applicant need only obtain assurance "sufficient...to justify...belief that the...site [is] suitable and available until advised otherwise." National, *supra*, 2 FCC Rcd at 5643 ¶ 11, quoting Puopolo Communications, Inc., 60 RR 2d 964 (Rev. Bd. 1986).

Elijah Broadcasting Corp., 68 R.R.2d 205, 207 ¶ 10 (1990). In Elijah, even a provision in a written

statement of assurance allowing for unilateral revocation of the assurance did not negate a finding of the existence of "reasonable assurance" of site availability. *Id.* at ¶ 11.²⁸

36. Thus, in this case, Davis clearly has acquired reasonable assurance of the availability of the transmitter site. A clear "meeting of the minds" exists as to the intended use of the site, the price to be charged, and the nature of the facilities to be provided. The siteowner has been contacted by Davis and its representative, and the siteowner's agent specifically has "grant[ed] [Davis] the authority to specify WBBY-FM's transmitter site in [her] FCC application." Davis Opposition, Exhibit 1, Att. A. Thus, the already-existing but nascent transmitter site remains available as a transmitter site, and specifically is available for Davis' use. Although terms as would be included in any comprehensive lease agreement remain to be negotiated, the need for that future negotiation does not negate "reasonable assurance" (Elijah, supra.), and various key terms of the lease, e.g., location of the site, equipment to be leased, and lease amount (\$6000), all already have been disclosed and are agreeable to Davis. More recently (prior to ORA's submission of its Motion) Davis again contacted the owner of the site's agent to confirm the continued availability of the transmitter site. As of May 25, 1993, Mid-Ohio's representative stated:

Mid-Ohio Communications, Inc. hereby reconfirms that it grants you the authority to continue to

²⁸ The cases cited by ORA are inapposite. Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331 (1991), states the opposite of what ORA claims -- the case specifically states that even an applicant's informal telephone contacts with a landowner, with details to negotiated at a future date, are sufficient to sustain a good faith belief of site availability. *Id.* at 4332 ¶ 11.

The other cases cited by ORA are similarly inapplicable. In National Communications Industries, 6 FCC Rcd 1978, 1979 ¶ 10 (Rev. Bd. 1991), unlike the facts existing here, there was no "meeting of the minds" concerning the availability of the specified site -- there was no determination with the landowner concerning how much land would be needed and no specific site location (or coordinates) was agreed upon -- the possibility of leasing land was discussed, but there was no determination by the landowner that the specific site was at all available. In Rem Malloy Broadcasting, 6 FCC Rcd 5843, 5846 ¶ 14 (Rev. Bd. 1991), unlike here, there was no determination by the landowner that he would be actually willing currently to make the site available -- only that he may have given the mistaken impression that there would (hypothetically) be "no problem" in giving a lease. Accord, William F. And Anne K. Wallace, 49 F.C.C.2d 1424, 1427 ¶ 6 (Rev. Bd. 1974) (no "reasonable assurance" where the landowner foresees "no problem" in an applicant's locating on his property but nevertheless fails to demonstrate that he is "favorably disposed" toward making an arrangement). Finally, unlike Adlai E. Stevenson, 5 FCC Rcd 1588, 1589 ¶ 6 (Rev. Bd. 1990), where there was no "meeting of the minds" as to the availability, here, the landowner specifically has affirmed that the site remains available.

In short, unlike the stream of cases cited by ORA, here, Mid-Ohio is aware of the nature of Davis' proposed use of its site, has communicated the precise location of the site for which it would enter into a lease, and has provided clear indications that it is "favorably disposed" to entering into such a lease.

specify WBBY-FM's transmitter location in the FCC application proceedings. We continue to wish you the best of luck in your application for licensure being processed by the Federal Communications Commission.

Exhibit 1, Att. D. The letter specifically states that Mid-Ohio "remains willing to negotiate appropriate leases" with Davis for lease of the transmitter site, studio space, and related equipment. This was reaffirmed in a Declaration supplied by the site's agent on September 15, 1993. See "Reply to Opposition to Motion to Enlarge the Issues Against WII Industries, Inc." filed on September 16, 1993.

37. Therefore, Davis received a "clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated" (Elijah, 68 R.R.2d at 207 ¶ 10), and Davis therefore has, and has always had, "reasonable assurance" of the availability of her proposed transmitter site. No issue was warranted, and ORA's exceptions in this regard should be denied, as well.

No Misrepresentation Issue Against Davis Is Warranted

38. As discussed above, there was no misrepresentation concerning Benjamin Davis. Ms. Davis' written hearing testimony does not in any way claim that Benjamin Davis was an officer or partner of Britt Business Systems, nor was that collateral topic a matter with respect to which Davis provided any written testimony, at any time. The written newspaper articles to which ORA refers (Davis Exh. 1, Att. 1 at Attachments B and E) were introduced (and accepted) for the sole purpose of establishing Ms. Davis' membership in the Chamber of Commerce and her status as a 1991 "Columbus Chamber of Commerce" Finalist. Davis Exh. 1 at 2 & 4. No "false jurats," "affidavits," or testimony have been submitted by Davis in this proceeding, at any time. Cf. ORA Exceptions at ¶ 24. Her written testimony does not include reference to the relationship her brother-in-law, Benjamin Davis, held with the company (nor would such a reference even have been relevant to the issues in this proceeding). Consistently, use of the exhibits specifically were so limited at the Admissions Session in this proceeding, and the information on which ORA relies is not part of the record to establish the "truth" to the Commission of the other matters asserted therein. TR 83, 92. Even more significantly, as Davis proved, Benjamin Davis factually, was indeed never an officer or director of Britt.

39. In short, there has been no misrepresentation to the Commission, and ORA has presented no

cognizable evidence of misrepresentation. ORA's only "evidence" of misrepresentation is the information contained in newspaper articles, yet as counsel for ORA persuasively argued at the Admissions Session in this proceeding, "newspaper articles" are not "evidence." TR 75-76, 92. Accord, News International, PLC, 97 F.C.C.2d 349, 358 (1984); Barry Skidelsky, 7 FCC Rcd 1, 6 ¶ 29 (Rev. Bd. 1992). Davis testified that she is not certain whether the inaccurate information in the articles is even attributable to her, and in any event, there is no evidence that even the newspaper was "intentionally" misled,²⁹ or more importantly, that there existed an intent to mislead the Commission. Nothing occurring at the hearing has called into play anything concerning the accuracy or veracity of Davis' Hearing Testimony provided by Davis under oath or her ability to be truthful and honest to the Commission.³⁰ The requested issue properly was denied.

ORA Is Not Entitled to a "Preference" for its Fully Spaced Proposal

40. ORA filed its application pursuant to Section 73.207 of the Commission's Rules (the minimum separation rules). Davis, ASF, and WII filed pursuant to Section 73.213 of the rules (insofar as Channel 280A is a grandfathered allotment) and Ringer filed pursuant to Section 73.215 (contour protection). Insofar as each applicant was found to be in compliance with the applicable processing rule, all five applications were accepted for filing and designated for hearing. Report No. 15189; David A. Ringer, 8 FCC Rcd 2651 (Chief, Audio Services Div. 1993) ("HDO"). ORA seeks a preference in this proceeding because its operation is fully spaced, and claims that the Commission prefers fully-spaced applicants. ORA Exceptions at ¶ 87.

41. ORA's contention must be rejected. The HDO in this proceeding already determined that:

The Commission will not give preferential treatment to applicants requesting processing under 47 C.F.R. § 73.207 over applicants requesting processing under 47 C.F.R. § 73.215 or 73.213.

²⁹ See TR 441 (she "might have" misinformed the newspaper of Ben Davis' status due to the pendency of discussions concerning whether Davis should become vice president of the corporation and whether a partnership arrangement should be established).

³⁰ Accord, Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1196 ¶ 36, 1204 ¶ 48, 1211, ¶ 61 (1986), recon. granted in part, denied in part, 1 FCC Rcd 421 (1986), modified, 4 FCC Rcd 3252 (1990), reconsidered, 6 FCC Rcd 3448 (1991), modified, 7 FCC Rcd 6564 (1992) (FCC is concerned with FCC-related misconduct and misrepresentations as well adjudications of misrepresentations occurring before other governmental units).

HDO, 8 FCC Rcd at 2652 ¶ 8. The Board is bound by this determination. Thus, ORA contention should be rejected.³¹

Conclusion

42. Shellee F. Davis clearly is the comparatively superior applicant in this proceeding. Her integration pledge is clear and unequivocal, she is the only applicant bringing minority and local ownership to this proceeding and moreover, she is a businesswoman with an proven ability to establish and nurture a successful business organization. Her background, coupled with her ties to the civic and business organizations in the Westerville area, make her uniquely deserving of the grant in this proceeding.

WHEREFORE, it is respectfully requested that the Exceptions filed by Ohio Radio Associates, David A. Ringer, Wilburn Industries, Inc., and ASF Broadcasting Corp. be denied, and that the Initial Decision in this proceeding be affirmed.

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January 5, 1994

Respectfully requested,

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³¹ For the reasons stated in Davis' Contingent Exceptions, ORA also is not entitled to a comparative coverage preference. Cf. ORA Exceptions at ¶ 86.

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that foregoing document was served on January 5, 1994 upon the following parties by First Class Mail, postage prepaid, or by Hand:

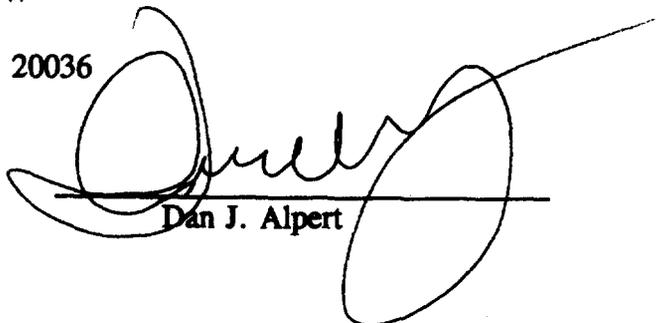
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