

JAN - 7 1994

Before the
Federal Communications Commission
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

For Construction Permit for an
FM Station on Channel 280A in
Westerville, OH

To: The Review Board

OPPOSITION TO MOTION TO STRIKE

Shellee F. Davis ("Davis"), her attorney, hereby opposes the request of Wilburn Industries, Inc. ("WII") to strike a portion of her "Consolidated Brief in Support of Initial Decision and Contingent Exception of Shellee F. Davis." WII's request is contained in footnote 4 of its "Reply Brief" filed on January 4, 1994.

WII accused Davis of alleging "for the first time" that Bernard Wilburn did not have liquid assets above current liabilities sufficient to meet his commitment to the applicant. Although WII effectively admits that the allegation is true, WII further claims that "[n]o party raised this matter below," that Davis is seeking "to raise an entirely new matter before the Board," that Davis is treating Exceptions "as if they were a belated petition to enlarge issues," and "the impropriety of such conduct by Davis...are manifest." WII Reply Brief at 6 n.4.

WII's allegations are reckless and false. Davis filed a "Motion to Enlarge the Issues

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Against Wilburn Industries, Inc." on August 19, 1993, WII responded on September 3, 1993, arguing, in part, that Bernard and Charles Wilburn's financial statements show that "Wilburn's principals had the financial wherewithal to meet all of the costs to be incurred" by WII (WII Opposition at 7), to which Davis responded:

review of Bernard Wilburn's financial statement reveals why review is necessary -- even though Bernard Wilburn has pledged to supply \$75,000 in funds, the Statement of Financial Position shows that he possessed only \$39,000 in liquid funds as of January 31, 1992.

Davis Reply (September 16, 1993) at 5. This matter, therefore, most assuredly was raised below, the argument never was the subject of a Motion to Strike by WII, and no Exception concerning the matter ever was filed by WII. Under Section 1.277(a) of the Rules, an applicant waives "any objection [to the Initial Decision] not saved by exception." 47 C.F.R. § 1.277(a). Therefore, WII certainly is not permitted to complain of Davis raising this matter now.

As seen in WII's pleading, and as noted above, WII essentially concedes that Bernard Wilburn did not himself have the committed funds, but attempts to introduce facts (for which there are no citation, because the alleged "facts" were never yet presented in depositions, pleadings, testimony, or documents filed or exchanged in this proceeding) that Charles Wilburn had agreed to "loan funds" to his son for his portion of his \$75,000 commitment. WII Reply Brief at 6 n.4. Putting aside the fact that claim is contrary to WII's FCC Form 301, it also is extra-record information that has no place in this proceeding. In short, WII request to "strike" Davis' argument is a bald attempt to introduce new, extra-record facts into this proceeding, to buttress its case, which should be rejected.

WHEREFORE, it is respectfully requested that the motion to strike contained in the "Reply Brief" filed by Wilburn Industries, Inc., be denied.

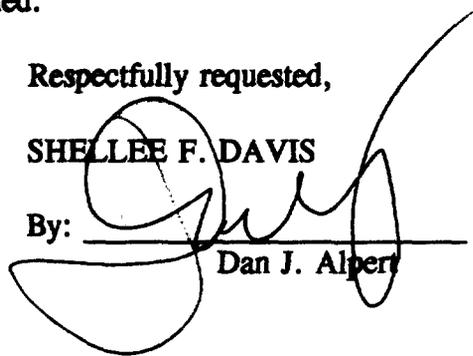
The Law Office of Dan J. Alpert
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January 6, 1994

Respectfully requested,

SHELLEE F. DAVIS

By:

A handwritten signature in black ink, appearing to read "Dan J. Alpert", is written over a horizontal line. The signature is stylized and somewhat cursive.

Dan J. Alpert

Her Attorney

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that foregoing document was served on January 6, 1994 upon the following parties by First Class Mail, postage prepaid, or by Hand:

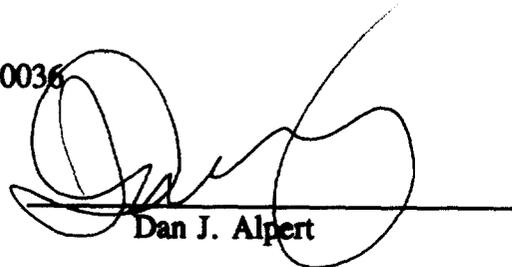
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