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

In re Applications of	)	MM Docket No. 93-241
	)	
DARRELL BRYAN	)	File No. BPH-920109MA
	)	
SBH PROPERTIES, INC.	)	File No. BPH-920123MD
	)	
	)	

For Construction Permit for  
New FM Channel 276A  
Tusculum, Tennessee

To: Honorable John M. Frysiak  
Administrative Law Judge

REPLY TO OPPOSITION TO  
SECOND PETITION TO ENLARGE ISSUES

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March 31, 1994

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SECOND PETITION TO ENLARGE ISSUES

SBH Properties, Inc. ("SBH") by counsel herewith submits its Reply to the "Opposition to Second Petition to Enlarge Issues" filed by Darrell Bryan ("Bryan") on March 14, 1994. 1/ In support whereof the following is shown:

I. SBH's Petition Was Timely Filed.

1. Bryan erroneously contends that SBH's Petition is untimely filed. Bryan does not dispute SBH's contention that the Petition was timely submitted with respect to SBH's receipt of a copy of the transcript of Bryan's deposition testimony, but argues that the Petition "is not based on any revelations concerning financing at deposition." Instead, Bryan contends

1. By Order (94M-188), released March 24, 1994, the Presiding Judge granted an extension of time up to and including March 31, 1994 for the filing of this Reply.

## SUMMARY

The tower quote submitted by Bryan in support of his Opposition may not be relied upon, as it has been provided under highly suspect circumstances with no showing that the person providing it has any expertise, whatsoever. Likewise, the quote Bryan submits for transmission equipment may not be relied upon, as it is premised on utilization of a 6 bay antenna, which Bryan cannot utilize. With regard to other challenged costs, Bryan has either acknowledged that they were understated, either affirmatively or by his failure to rebut SBH's contentions in this regard. Accordingly, even without considering his understated operating costs and the understated costs for an undetermined transmitter, SBH has demonstrated that Bryan understated his costs of construction and initial operation by some \$ 30,000.00, When the \$ 1,000.00 to \$ 33,000.00 understatement of the cost of a transmitter is added, it is clear that Bryan's estimates were not reasonably ascertained.

Equally flawed were Bryan's efforts to demonstrate the availability of a proposed bank loan. Having failed to meet the Commission's documentation requirements and having an inadequate basis for knowing whether or not he could comply with the terms and conditions of the loan, it was improper for him to rely upon it in certifying his financial qualifications.

Furthermore, even if he could rely on the bank loan, its proceeds would be precisely equal to his estimated costs, which

have been shown to be understated. Therefore, to the extent that it is concluded that his costs were understated to any degree, his costs would exceed his available funds, rendering him unqualified.

Bryan has either obstructed discovery by failing to produce documents he was required to produce or he lacked candor in testifying to the existence of documents which do not in fact exist.

Accordingly, numerous substantial and material questions of fact have been raised concerning Bryan's qualifications and appropriate issues should be added.

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that SBH should have filed its Petition upon receipt of copies of the documents produced by Bryan in response to the Standard Document Production. Bryan's contention clearly is without merit and must be rejected. The unsworn documents in question would have been insufficient to support any request for enlargement of the issues, absent Bryan's sworn testimony, identifying and explaining their significance, a point which Bryan most certainly would have argued had SBH filed a such a request, prematurely. Instead, SBH questioned Bryan at his deposition regarding these documents and filed its Petition, based on his testimony regarding those documents, as well as other aspects of his proposal. Thus, SBH's Petition is premised upon facts developed from the combination of Bryan's testimony and the referenced documents, as their significance was illuminated by his testimony. Accordingly, the Petition was timely filed within 15 days of SBH's receipt of the transcript of that testimony.

II. Bryan's Opposition is Improperly Supported.

2. With the exception of the Engineering Statement of Garrett G. Lysiak, P.E., which is supported by an affidavit, Bryan's Opposition is unsupported, contrary to the requirements of Section 1.229(d). Neither Bryan's Declaration nor the attached proposal from Hall Electronics nor the "quotes" from American Aviation, Inc. are sworn or given under penalty of perjury. Thus, except to the extent that the factual contentions advanced in Bryan's Opposition are supported either by Mr. Lysiak's Engineering Statement or by Bryan's cited deposition

testimony, they may not properly be considered.

III. A Material Question of Fact Exists Regarding Whether Bryan Underestimated His Costs of Construction and Initial Operation.

Tower Proposal.

3. As demonstrated in SBH's Petition, in estimating his costs of construction Bryan budgeted a total of \$ 16,000.00 for the purchase and installation of a 300 foot guyed tower, an estimate which SBH demonstrated to be understated by at \$ 11,000.00. In his Opposition Bryan does not indicate what he based his tower estimate upon or what it included. Thus, it remains unclear whether this figure included installation, lighting, mounting the antenna and transmission line, site preparation, hardware or even the foundation for the tower. In his Opposition Bryan attempts to support his unreasonably low estimate for a 300 foot tower by relying on a "quote" from "American Aviation, Inc." However, this "quote," again, does not indicate that installation of the antenna and transmission line, site preparation or even the foundation for the tower are included, nor does it even indicate that a new, as opposed to a used, tower is contemplated.

4. More significantly, Bryan has offered no evidence that American Aviation, Inc. is engaged in the business of radio tower sales and installation or that its President, Walter J. Stone, possesses any expertise, whatsoever, in that regard. Indeed, the letterhead on which the "quote" is written reflects that American

Aviation, Inc. holds itself out as: "Navigation Aids and Airport Lighting Specialists." As reflected in the attached Declaration of William Seaver (Exhibit A, hereto), there is no phone listing for American Aviation, Inc. in Greeneville, Tennessee. The address and phone number given for American Aviation, Inc. are those for Walter J. Stone's residence. It should also be noted that Mr. Stone is the same person who provides contract engineering services for Bryan's AM station. (See Exhibit B, hereto) He is the same person who "spliced" the sampling cable for the remote meter, resulting in erroneous readings, and failed to properly recalibrate the station's remote monitoring meters for a period of over a year, resulting in several rule violations. (See: Attachment E to Bryan's Opposition to Petition to Enlarge Issues, filed November 12, 1993 and SBH's Reply, filed December 10, 1993, at paras. 12, 14-15)

5. As further reflected in the attached Declaration of William Seaver, he spoke with three persons who reside in the Greeneville area, who know Walter J. Stone and have knowledge of his business activities: Jeff Howell, Manager of the maintenance facility of the Greeneville Municipal Airport, Ray Elliot, Chief Engineer for WGRV(AM) and WEKQ(FM), Greeneville, Tennessee, and Wayne Harris, who is the General Manager of WNPC-AM/FM, licensed to nearby Newport, Tennessee. While each of the three indicated knowledge of Mr. Stone and his business activities, each also indicated that to the best of their knowledge Mr. Stone had never been involved in the construction or installation of radio

towers.

6. As further reflected in the attached Declaration of William Seaver, he also spoke with Trevor Sworyer, Chief Engineer for WETS(FM), Johnson City, Tennessee, who also does contract engineering for stations in the East Tennessee area, and Roger Bouldin, Chief Engineer for WUSJ(FM), Elizabethton, Tennessee. Despite their knowledge and familiarity with persons active in the technical aspects of broadcasting in East Tennessee, neither had ever heard of Mr. Stone.

7. As Mr. Seaver explains in his attached Declaration, he had previously obtained quotes for the purchase and installation of a 300 foot guyed tower from two established, recognized suppliers: Continental Electronics (\$ 26,996.00) and RF Specialties of Florida, Inc. (\$ 37,500.00). Following receipt of Bryan's Opposition, he spoke with Bill Hoisington of RF Specialties who indicated that the tower "quote" Bryan obtained from American Aviation, Inc. was unrealistically low and would have to be for a used, not a new, tower.

8. From the foregoing it appears that having relied upon an unrealistically low estimate for his proposed 300 foot tower and having had his bluff called, Bryan was unable to find an established, recognized manufacturer or equipment supplier who was willing to provide a quote any where near the \$ 16,000.00 he had included in his budget. Accordingly, he convinced his contract engineer, Walter J. Stone, to provide him with a quote "to order" as an accomodation, despite the fact that Mr. Stone is

not regularly engaged in the business of tower sales and installation and has no apparent experience in this area and, accordingly, no expertise upon which to base any quote. Thus, not only has Bryan failed to establish that Walter J. Stone has any expertise, whatsoever, in the construction and installation of radio towers (a matter which may not simply be assumed), given his prior relationship with Bryan, it appears that Mr. Stone may well have simply been doing Bryan a favor by preparing baseless "quotes" solely for purposes of supporting Bryan's Opposition. Nor has Bryan established that the tower that Mr. Stone "quoted" is a new tower or whether the "quote" includes installation of the antenna and transmission line, site preparation or even the foundation for the tower.

9. As such the quote which Bryan recently obtained from Mr. Stone cannot be relied upon to demonstrate his current ability to construct a tower at that price, much less to demonstrate his ability to have done so at the time he certified his financial qualifications. <sup>2/</sup> Inasmuch as Bryan has offered no reliable evidence to rebut the showing advanced in SBH's Petition and the views expressed by an established broadcast equipment supplier (as summarized in the attached Declaration of William Seaver), it must be concluded that the cost of constructing a 300 foot guyed tower with appropriate lighting, foundation and installing the

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2. If Bryan's ploy is contended through the acceptance of Mr. Stone's "quote," nothing would preclude anyone possessing an official-looking letterhead from providing "quotes" to support any cost estimate, however unrealistic, nor would the Commission have any principled basis for rejecting such a "quote."

proposed antennas and transmission lines, would cost at least \$ 26,996.00, as established in SBH's Petition, and that Bryan has underestimated his costs in this regard by at least \$ 11,000.00.

Transmission Equipment.

10. In its Petition SBH demonstrated (at para. 6) that Bryan's application reflected (at Exhibit E-2) a proposal for a 2 bay antenna, while his written, itemized cost estimates reflected a proposal to utilize a 6 bay antenna and that his deposition testimony indicated that he did not know which was correct, but that he intended to do whatever was "best." SBH contended that the 2 bay proposal advanced in Bryan's application must be deemed controlling and demonstrated that the costs of a transmitter, antenna and transmission line to implement that proposal would cost a total of \$ 59,389.00 and, accordingly, that Bryan had understated these costs by \$ 38,339.00.

11. In his Opposition Bryan contends that he is not bound by the 2 bay antenna proposed in his application and that the costs for his proposed transmitter, antenna and transmission line are only understated by some \$ 3,723.00. In support of this contention Bryan argues that FCC Form 301 does not require the number of bays to be specified and that the the antenna sketch is not drawn to scale. However, the fact that the sketch, which clearly depicts a 2 bay antenna, is not drawn to scale has no impact either on the number of bays depicted or the space available for their location, inasmuch as the radiation center is

explicitly defined. <sup>3</sup>/ Likewise, while it is certainly true that FCC Form 301 does not require disclosure of the number of bays proposed, where as here an applicant volunteers such information, it should be held to the proposal volunteered. Furthermore, it bears noting that an applicant must develop a firm technical proposal before it can determine the costs of implementing that proposal.

12. Here, Bryan has essentially acknowledged that he has no definitive technical proposal, which in turn precluded him from reasonably ascertaining his construction costs. This is not simply a theoretical problem, inasmuch as Bryan's failure to develop a definitive proposal resulted in his improper reliance upon costs estimates (for a transmitter, antenna and transmission line), based upon a 6 bay antenna proposal, which his own engineer acknowledges cannot be implemented, inasmuch as the maximum number of bays Bryan may utilize is four. Briefly stated, Bryan had (and has) no definitive technical proposal and, thus, no reliable basis for determining his costs. Accordingly, he cannot properly be found to be financially qualified.

13. In support of his contention that his transmitter, antenna and transmission line costs are not substantially understated, Bryan submits an equipment proposal from Hall

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3. In his Engineering Statement, appended to Bryan's Opposition, Mr. Lysiak acknowledges: (a) that Exhibit E-2 "depicts a 2 bay antenna" and (b) that space only permits "up to 4 bays to be mounted on the tower."

Electronics, dated March 2, 1994. <sup>4</sup>/ Therein, he proposes total transmitter/exciter (\$ 17,200.00) and transmission line (\$ 1,448.00) costs of \$ 18,648.00, based on a proposal to utilize a 6 bay antenna. However, the sworn Engineering Statement of Garrett G. Lysiak, P.E., submitted by Bryan in support of his Opposition, establishes that the maximum number of bays which Bryan's antenna may contain is four, not the six bays assumed by Hall Electronics in specifying the transmitter, antenna and transmission line quotes reflected in its March 2, 1994 proposal, which assumption was also utilized by Bryan in developing his written itemization of costs prior to filing. Mr. Lysiak states:

A distance of 4.4 meters (14.4 feet) exists from the antenna center of radiation to the top of the tower (excluding lighting). This distance will allow an antenna up to 4 bays to be mounted on the tower. (emphasis added)

Thus, the price quotations for the transmitter, antenna and transmission line provided by Hall Electronics may not be relied upon, given the fact that they are premised upon the false assumption that a 6 bay antenna could be utilized, permitting the use of a lower power transmitter and smaller transmission line, resulting in reduced costs.

14. Although Mr. Lysiak suggests that use of a 4 bay antenna would be feasible and appropriate, Bryan has never estimated the costs of a 4 bay (or less) antenna or the (increased) costs of

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4. Bryan claims (Declar. p. 1) that he relied upon an oral quote from Hall Electronics in developing the written, itemized estimate of costs upon which he relied in certifying his application. However, he does not attempt to explain how he came to understate the cost of so many items, if he obtained those prices from Hall Electronics.

the transmitter and transmission line necessary to power such an antenna. Instead, as indicated above, his cost estimates have always been erroneously premised on the significantly less expensive transmitter and transmission line that could be utilized with a 6 bay antenna. As Mr. Lysiak demonstrates in his Engineering Statement, the number of bays utilized significantly impacts the required transmitter output power. <sup>5</sup>/ While Lysiak suggests that a 3.25 kw transmitter could be used with a 4 bay antenna, he offers no evidence that such a transmitter actually exists. Transmitters are not available at any desired power level, but are manufactured at certain incremental power levels. While it is uncertain precisely what a transmitter would cost, given the uncertainty of Bryan's proposal in light of his repudiation of the 2 bay antenna and inability to utilize a 5 or 6 bay antenna, it is clear that the cost of a transmitter for use with a 3-4 bay antenna would fall somewhere between Hall Electronic's \$ 17,200 quote (for a 6 bay proposal) and the \$ 49,000 cost of the transmitter needed for use with a 2 bay antenna. <sup>6</sup>/ Thus, while the specific amount is uncertain, it

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5. It is for this reason that Lysiak can term the 11 kw transmitter priced in SBH's Petition as "overkill." It certainly would be overkill, if used with a 6 bay antenna. However, an 11 kw transmitter is entirely appropriate and is in fact commonly utilized with 2 bay antennas.

6. The reduction from 6 to 2-4 bays would not significantly reduce antenna costs, inasmuch as the cost of a 6 bay antenna (\$ 5,995, as quoted by Hall Electronics), is only \$ 850.00 more than the cost of a 2 bay antenna, which, as established in SBH's Petition, would be \$ 5145.00. The increased cost of the transmission line and associated hardware is discussed below.

may be stated with certainty that Bryan has understated the cost of his transmitter by between \$ 1000.00 and \$ 33,000.00.

Other Constuction Costs.

15. In addition to the foregoing, as demonstrated below, Bryan concedes, either affirmatively or though his failure to rebut the showing advanced in SBH's Petition, that he has understated a number of his other itemized cost estimates by a total of \$ 18,923.50.

16. Bryan proposed a transmission line for an antenna mounted near the top of a 300 foot tower, which he claimed he could purchase for only \$ 450.00. In its Petition SBH demonstrated that \$ 5,155.00 would be required, based on use of 1-1/4 inch line and including all necessary connectors and mounting and grounding hardware. In support of his Opposition Bryan submitted an equipment proposal which specifies 300 feet of Cablewave 7/8 inch transmission line at a cost of \$ 1,446, plus \$ 130.00 for connectors. No mounting and grounding hardware was included. However, the sworn Engineering Statement of Garrett G. Lysiak, submitted by Bryan in support of his Opposition, establishes that 300 feet of 1-5/8 inch transmission line will be required to provide the proposed effective radiated power, not 7/8 inch line. <sup>7</sup>/ As reflected in the attached Declaration of William Seaver, based on a quote from RF Specialties, 300 feet of

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7. Hall Electronics apparently included the smaller transmission line as a result of its false assumption that a 6 bay antenna could be utilized.

1-5/8 inch Cablewave transmission line will cost \$ 4,866.00. The cost of connectors for 1-5/8 inch transmission line (which are more expensive than those for 7/8 line) will cost an additional \$ 560.00. This does not include the cost of the necessary mounting and grounding hardware, which would cost an additional \$ 597.50, resulting in a total cost of \$ 6,023.50. Accordingly, it must be concluded that Bryan understated his costs of acquiring transmission line, connectors and mounting and grounding hardware by \$ 5,573.50.

17. Despite the fact that Bryan's estimate for an audio console was not challenged in SBH's Petition, the equipment proposal submitted in support of Bryan's Opposition reflects a price almost twice the amount that Bryan had estimated for this item, increasing it's cost from \$ 1,595.00 to \$ 3,000.00. Thus, Bryan understated the cost of this item by \$ 1,400.00.

18. Likewise, although Bryan's estimate in this regard had not been challenged by SBH, the equipment proposal submitted in support of Bryan's Opposition reflects a price for his proposed automation system of \$ 9,500.00. Thus, Bryan understated the cost of this item by \$ 1,000.00.

19. Bryan estimated the cost of an Orban Optimod at \$ 3,500.00. In its Petition SBH established that the cost of a new Orban Optimod for an FM station would be \$ 5,950.00, almost twice the amount budgeted for that item by Bryan. In his Opposition Bryan offered no evidence, whatsoever, to refute SBH's contention regarding the actual cost of this item. Instead, he

simply substituted a quote for an entirely different item of equipment (Hnat Hinder Ultramod) in place of the specified Orban Optimod in order to reduce the cost to a level consistent with his original estimate. As such, Bryan's response simply serves to prove SBH's contention that Bryan had significantly underestimated the cost of purchasing the Orban Optimod he had proposed, understating the cost of this item by \$ 2,450.00.

20. Likewise, Bryan proposed a Mosley STL package at a used price of \$ 5,500. In its Petition SBH established that the cost of a new Mosley STL package would be \$ 9,200.00. Instead of addressing SBH's contention, much less rebutting it, Bryan once again simply substitutes a quote for an entirely different (and less expensive) item of equipment in order to reduce the cost to a level closer to his original estimate. Thus, Bryan's response simply serves to prove SBH's contention that Bryan's estimate for the Mosley STL package he proposed was understated by \$ 3,700.00.

21. Bryan originally proposed to operate his STL system by utilizing a single Scala Paraflector Antenna, which he claimed he could purchase used for \$ 500.00. In its Petition, SBH noted that two such antennas will be required, not one. In his Opposition, Bryan concedes the need for two such antennas. However, he offers no evidence to support his contention that these could be purchased used at a cost of \$ 500.00 each. Instead, he now suggests that both can be purchased, new, for a total of \$ 600.00, only \$ 100.00 more than his estimate for a single used antenna. As reflected in the attached Declaration of

William Seaver, he was advised by Bill Hoisington of RF Specialties that there must be some error in the Hall Electronics quote of \$ 600.00 for two new Scala Parareflector antennas, inasmuch as such a price would be below cost. RF Specialties quoted \$ 630.00, each, for new Scala Parareflector antennas. In addition Bryan omitted the costs of mounting and grounding hardware for his STL transmission line, which will add \$ 346.80. Thus, it must be concluded that Bryan understated the cost of STL antennas and related hardware by \$ 1,000.00.

22. Bryan proposed a Belar Stereo Monitor, which he claimed would cost only \$ 879.00. In its Petition SBH demonstrated that a new Belar Stereo Modulation Monitor would cost \$ 2,050.00 and that, in addition, an FM Modulation Monitor (\$ 1,790.00) and FM RF Amplifier (\$ 850.00) would also be required, bringing the total to \$ 4,690.00 for modulation equipment. In his Opposition, Bryan concedes that the FM Modulation Monitor and FM RF Amplifier will be required and that he underestimated the cost of a Belar Stereo Monitor by \$ 1,200.00. Thus, it must be concluded that Bryan understated the cost of modulation equipment by \$ 3,800.00.

23. Therefore, in light of the foregoing, it is clear that, in addition to the cost of his tower and transmitter, Bryan has understated a number of his itemized cost estimates by at least \$ 18,923.50. Thus, without considering the amount by which Bryan has understated the cost of his transmitter, he has understated the cost of his tower (\$ 11,000.00) and other equipment

(\$ 18,923.50) by a total of \$ 29,923.50.

Reliance Upon Prices for Used Equipment.

24. With the exception of two items which it specifically identifies as "New," there is no evidence that the prices quoted by Hall Electronics are for new equipment. Thus, with the exception of (1) the Marti STL Composite System and (2) the Scala parareflector antennas, which Hall Electronics clearly identifies as "New," there is no representation in its March 2, 1994 proposal that any of the equipment is new. The conclusion that the remaining items reflect used, reconditioned equipment is consistent with the approach Hall Electronics has utilized in its commercial advertisements. Thus, as reflected in the copies of its advertisements published in Radio World (Exhibit C, hereto), Hall Electronics practice is to distinguish new from used, reconditioned equipment by specifying those items reflecting new equipment with the designation "New."

25. Further evidence that the equipment prices Bryan obtained from Hall Electronics are for used, reconditioned equipment is reflected in the unexplained changes in certain items of equipment between Bryan's original written itemization and the March 2, 1994 proposal from Hall Electronics. Thus, while Bryan initially proposed a B/E Audio console, the March 1994 proposal substitutes a Fidelapak console. Likewise, while Bryan initially proposed two Technics turntables at a cost of \$ 1,250.00, the March 1994 proposal reduces the number of turntables from two to one at the cost of \$ 960.00. Bryan offers

no explanation to justify this reduction in his equipment needs. The apparent explanation is that the costs cited both initially and in the latest proposal are for used, reconditioned equipment, which Hall Electronics happened to have in stock at a given moment. Thus, the constantly changing array of equipment not only supports the contention that the prices quoted are for used equipment, but also demonstrates why an applicant may not properly based its estimates on used equipment (unless the applicant owns it or its availability is equally certain), inasmuch as there exists no legitimate expectation of its continued availability.

Omission of Initial Operating Costs.

26. Bryan acknowledges that he failed to include in his cost estimate the cost of debt service for the first month of operation, despite the fact that he had no legitimate basis for assuming that the Bank would agree to any deferral of repayment. Bryan fails to address SBH's contention (Pet. at paras. 7 & 19) that additional debt service would have to be accounted for, unless deferred, from the time the loan proceeds were drawn down for construction. Likewise, Bryan fails to address SBH's contention that the costs of electric service have been omitted, both for the first month and during the construction phase. Bryan's response is to suggest simply that such costs could be met out of his available funds, apparently referring to the alleged \$ 38,500 "surplus." However, as discussed below, that surplus has not been demonstrated to exist.

IV. Bryan Has Not Demonstrated The Availability of Sufficient Funds to Meet His Costs of Construction and Initial Operation.

The Proposed Loan.

27. Bryan has not met the Commission's standards for demonstrating the availability of his proposed loan. In its Petition SBH demonstrated (at paras. 9-10, 15, 22-26) that the December 12, 1991 letter from the Greene County Bank upon which Bryan relied when he certified his financial qualifications:

- (a) failed to state any terms of repayment, as required, and
- (b) failed to provide Bryan with the ability to determine whether he could comply with the terms and conditions of the loan (as is also required), given that (i) he had had no discussions with the Bank regarding the required pledge of stock as security and (ii) he did not know what the terms of repayment would be. <sup>8</sup>/

28. In his Opposition Bryan argues that the letter does include terms of repayment to the extent that it indicates an interest rate and a term of 15 years and that the pledge of stock was to have been required only were Bryan to incorporate. However, neither of these contentions is supported by the facts. The letter on its face is silent both as to the conditions, if any, under which a pledge of stock would not be required, as well

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8. Bryan is correct in stating (at p.7) that SBH incorrectly referenced the page number of the transcript of Bryan's deposition testimony regarding the lack of discussion of repayment terms. The page was incorrectly cited (at para. 7) as Depos. p. 14, when the transcript citations in that paragraph should have been Depos. pp. 14-16)

as the terms of repayment of the loan. Contrary to Bryan's contention, the fact that the letter indicates that the loan is to be "amortized" over a term of 15 years at a particular interest rate does not constitute the "terms of repayment," but merely indicates that the loan would be repaid over 15 years under some unspecified terms of repayment (involving weekly, monthly, annual or bi-annual, etc., installments, which might include principal or interest or both). Furthermore, the record reflects that Bryan had had no definitive discussion with the Bank regarding any terms of repayment prior to certification and filing and he acknowledged at his deposition that terms of repayment still had not been decided. (Depos. pp. 15-16) Likewise, he had had no discussion with the Bank regarding the requirement for the pledge of stock until 1993. (Depos. pp. 23-26) 9/

29. Accordingly, as discussed in SBH's Petition (at paras. 15, 22-26), absent the documentation of the proposed loan which met the Commission's explicit standards and/or absent the ability to determine whether he could meet the terms and conditions of the loan (which he could do only if he knew what they were), Bryan could not properly certify his financial qualifications, premised on a loan from the Greene County Bank, and, inasmuch as

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9. Conspicuously absent from Bryan's Opposition is any affidavit or even unsworn statement of any officer of the Bank indicating that either terms of repayment or the conditions under which a pledge of stock would not be required were discussed prior to the filing of Bryan's application.

that was his sole, stated source of funds, he was not financially qualified.

The Alleged Surplus of Funds.

30. Even had Bryan met the Commission's standards for demonstrating the availability of his proposed loan from the Greene County Bank, he has failed to demonstrate the availability of the alledged \$ 38,500 surplus of loan proceeds over his written, itemized costs upon which he relies in his Opposition to meet those construction and operating costs which he either understated or omitted. As an initial matter, Bryan's application reflects no surplus of funds, inasmuch as Section III reflects a total estimate of costs of \$ 175,000.00, precisely the amount of his proposed loan. This constitutes a representation on his part at the time he certified his financial qualifications that there did not exist any surplus of funds. Furthermore, in its Petition SBH challenged the availability of any alleged surplus of funds on the basis of Bryan's admission that at least a portion of those funds not specifically earmarked for items reflected on his written itemization of costs, i.e. Depos. Ex. 2, had been earmarked to pay prosecution costs, including attorney's and engineering fees. <sup>10</sup>/ Bryan has not disputed this fact. Indeed, his Opposition offers no defense, whatsoever, to SBH's contention that his claimed "surplus" could not be relied upon

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10. Official Notice may be taken that in the numerous cases settled, subsequent to the limitation of settlement payments to out of pocket expenses, that legal and engineering fees incurred in comparative proceedings typically exceed \$ 38,500.00.

and was essentially nonexistent. Whether or not Bryan's silence may be deemed an admission, there can be no question that any claim that any understated or omitted costs can be met out of such a surplus must be rejected as entirely unsupported. Accordingly, to the extent that SBH has demonstrated that any cost item has been significantly understated, it has raised a prima facie case warranting issue enlargement, inasmuch as Bryan may not be assumed to have any surplus of funds to meet any shortfall, much less any significant one.

V. Bryan Has Obstructed of Discovery.

31. As established in SBH's Petition (at paras. 11-14, 27), Bryan failed to produce even a single document relating to either his claimed civic activities or his broadcast experience in response to discovery. His response to SBH's Initial Supplemental Request for Production indicated that such documents had already been produced, despite the fact that none had. Thereafter, he testified at his deposition that did have documents relating to or establishing his involvement in his claimed civic activities and broadcast employment positions, almost without exception. As a result of that testimony, reflecting that he had failed to produce documents, which were required to be produced, SBH sought an issue to determine whether Bryan had obstructed the discovery process. In his Opposition Bryan contends that he possesses none of the documents about which he testified at his deposition, with

the exception of a few plaques and certificates, which are in frames. However, he never disclosed the existence of or identified or explained the unavailability of any these documents in response to either the Standard Document Production procedures or in response to SBH's Supplemental Request. Bryan's discovery responses are a matter of record and speak for themselves, as does his deposition testimony. SBH submits that a prima facie case warranting addition of the requested issue has been sufficiently established. Alternatively, should he be of the view that Bryan is currently telling the truth in contending that no responsive documents exist, the Presiding Judge should add an appropriate issue to determine whether Bryan lacked candor in his deposition testimony to the contrary.

VI. SBH Has Met Its Burden of Establishing a Prima Facie Case, Warranting Enlargement of the Issues, As Requested.

32. In his Opposition Bryan erroneously contends that he was entitled in certifying his financial qualifications to base his cost estimates on used equipment, even though it was neither on hand or equally available, as if it were on hand. This contention is contrary to precedent and logic. As reflected in SBH's Petition (at para. 16), it is a long and well established principle of Commission law that, where an applicant proposes to rely on used equipment, it must demonstrate either that it has the equipment on hand or that the equipment is as readily available, as if it were on hand, at a specified price. United