

ANNE GOODWIN CRUMP\*  
VINCENT J. CURTIS, JR.  
PAUL J. FELDMAN\*  
RICHARD HILDRETH  
EDWARD W. HUMMERS, JR.  
FRANK R. JAZZO  
KATHRYN A. KLEMAN  
BARRY LAMBERGMAN  
PATRICIA A. MAHONEY  
M. VERONICA PASTOR\*  
GEORGE PETRUTSAS  
LEONARD R. RAISH  
JAMES P. RILEY  
MARVIN ROSENBERG  
LONNA M. THOMPSON  
KATHLEEN VICTORY\*  
HOWARD M. WEISS  
\*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209

P. O. BOX 33847

WASHINGTON, D.C. 20033-0847

(703) 812-0400

TELECOPIER

(703) 812-0486

PAUL D.P. SPEARMAN  
(1936-1982)  
FRANK ROBERSON  
(1936-1981)

RETIRED  
RUSSELL ROWELL  
EDWARD F. KENEHAN  
ROBERT L. HEALD  
HENRY J. FLETCHER

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APR 18 1994

OF COUNSEL  
HOWARD A. CAINE\*

SPECIAL COUNSEL  
CHARLES H. KENNEDY\*  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
OFFICE NUMBER  
(703) 812-

0450

April 18, 1994

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

93-155

Dear Mr. Caton:

Transmitted herewith on behalf of Richard P. Bott, II is the original with six copies of his "Application for Award Pursuant to the Equal Access to Justice Act."

If further information is necessary, please contact the undersigned.

Yours very truly

James P. Riley  
Counsel for  
Richard P. Bott, II

JPR/rhw  
Enclosure

cc: Hon. Arthur I. Steinberg (w/enclosure)

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APR 18 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BEFORE THE

1

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In re Application of )  
 )  
RICHARD BOTT, II )  
(Assignor) )  
 )  
and )  
 )  
WESTERN COMMUNICATIONS, INC. )  
(Assignee) )  
 )  
For Assignment of the )  
Construction Permit of )  
Station KCVI (FM), Blackfoot, )  
Idaho )

MM DOCKET NO. 93-155  
File No. BAPH-920917GO

Directed to: Honorable Arthur I. Steinberg  
Administrative Law Judge

**APPLICATION FOR AWARD PURSUANT TO  
THE EQUAL ACCESS TO JUSTICE ACT**

Richard Bott, II, assignor in the above-captioned proceeding, hereby respectfully submits an application for the award of fees and expenses incurred in the above-captioned hearing proceeding. With respect thereto, the following is submitted:

**I. THE EQUAL ACCESS TO JUSTICE ACT  
IS APPLICABLE TO THE ABOVE-CAPTIONED PROCEEDING**

1. The Equal Access to Justice Act, 5 U.S.C. 504 ("EAJA") applies to any adversary adjudication before the Commission. 47 C.F.R. § 1.1502. An adversary adjudication is defined as one in which the position of the Commission is presented by an attorney or other representative who enters an appearance and participates

in the proceeding. 47 C.F.R. § 1.1503(a). The above-captioned hearing proceeding clearly was an adversary adjudication subject to the EAJA.

2. Bott originally obtained the construction permit for unbuilt station KCVI(FM) through a comparative hearing and subsequent appeals before the Commission. Richard P. Bott, II, 5 FCC Rcd 2508 (1990). A competing applicant's appeal to the United States Court of Appeals for the District of Columbia Circuit was also denied. Radio Representatives, Inc. v. FCC, 926 F.2d 1215 (D.C. Cir. 1991). The construction permit was issued to Bott on December 18, 1991. Subsequently, on September 17, 1992, Bott filed the above-captioned application to assign the construction permit to Western Communications, Inc.

3. Radio Representatives, Inc. ("RRI"), the former competing applicant for the Blackfoot construction permit, filed a "Petition to Deny" the proposed assignment. The Commission found that RRI had no standing as a party-in-interest to file a petition to deny but designated the assignment application for hearing based in part upon the allegations raised by RRI. Hearing Designation Order and Notice of Opportunity for Hearing, 8 FCC Rcd 4074 (1993) ("HDO").

4. The following issues were specified in the HDO:

(a) To determine whether Richard P. Bott II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.

(b) To determine, light of the evidence adduced pursuant to issue (a), whether Richard P. Bott, II is qualified to remain a Commission permittee.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application should be granted.

Id. at para. 14. The HDO further stated that, irrespective of whether the hearing record warranted an order denying the assignment application, it should be determined whether an order of forfeiture in an amount not to exceed \$250,000 should be issued against Bott for violations of the Commission rule regarding submission of truthful statements to the Commission.

Id. at para. 15.

5. Although RRI was excluded as a party to the hearing proceeding, the position of the Commission was represented by attorneys for the Mass Media Bureau who entered an appearance and participated in the proceedings. Moreover, the Commission also took a position adverse to Bott in the sense that substantial penalties, including a large forfeiture and/or a judgment that Bott was not fit to be a Commission permittee, were threatened. thus, it is clear that the hearing conducted pursuant to the HDO was an adversary adjudication conducted by the Commission. 47 C.F.R. § 1.1503. Therefore, the EAJA applies to the above-captioned proceeding.

## II. BOTT IS ELIGIBLE FOR AN AWARD UNDER THE EAJA

6. In order to be eligible for an award of attorneys fees and other expenses, an applicant must have been a party to the

adversary adjudication for which it seeks an award. 47 C.F.R. § 1.1504(a). Obviously, Bott as the permittee was a party to the proceeding in question. Further, an individual applicant may not have a net worth in excess of \$2 million. Attached hereto as Exhibit 1 is information demonstrating that Bott's net worth is less than this amount.

III. BOTT IS ENTITLED TO REIMBURSEMENT UNDER THE EAJA

7. The Commission's regulations provide that a prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the presiding Administrative Law Judge determines that the Commission's position over which the applicant prevailed was substantially justified. 47 C.F.R. § 1.1505(a). The Commission's position includes not only its position during the hearing but also its action upon which the adversary adjudication was based. Id. The burden of proof that an award should not be made is on the appropriate Bureau, in this case the Mass Media Bureau. Id.

8. In the instant case, it is clear that the Commission's actions in designating the application for hearing and in proceeding forward with the hearing were not substantially justified. The presiding Administrative Law Judge concluded by Summary Decision, FCC 94D-1, released January 28, 1994, that Bott had not misrepresented facts to or lacked candor with the Commission and that the above-captioned assignment application should be granted. The Summary Decision also noted that in its rationale for the specification of a misrepresentation/lack of

candor issue, the HDO relied upon certain statements which it alleged that Bott had made. The basis for the designation of the misrepresentation/lack of candor issue, and thus the basis for the entire proceeding, rested on an alleged contradiction between Bott's testimony during the comparative hearing and his statements made in opposition to the RRI "Petition to Deny" in the instant proceeding. Specifically, the HDO claimed that while Bott had made an unconditional integration pledge and had testified that he had not decided on a format during the comparative proceeding, Bott represented during the instant proceeding that he had always intended to operate with a commercial religious format. HDO at Para. 9.

9. While there clearly is an inconsistency between the two statements that Bott is alleged to have made, the Summary Decision concludes that Bott never, in fact, made any statement that he had always intended to operate with a commercial religious format. "On the contrary, the statements in question appear to have been derived from the 'Summary' and 'Background' portions of RRI's Reply to Opposition to Petition to Deny, which contained grossly inaccurate characterizations of Bott's actual statements." Summary Decision at Para. 35 (emphasis added). Further, the Mass Media Bureau acknowledged that it did not possess a copy of a written statement or a transcript of any oral representation by Bott to the Commission in which Bott asserted that throughout the six-year effort to obtain the permit, or throughout the comparative proceeding, he always intended to

operate with a commercial religious format. Summary Decision at Para. 33.

10. Thus, it is clear that the designation of the instant proceeding for hearing rested entirely upon the Commission's unquestioning acceptance of RRI's "grossly inaccurate characterizations" of Bott's statements to the Commission. The Commission has admitted, through its Mass Media Bureau, that it had nothing else before it to suggest that Bott had misrepresented facts to or lacked candor with the Commission in his statements. Indeed, an independent and objective reading of Bott's pleadings clearly would have revealed that Bott had never made the statements attributed to him by RRI, and thus that there was no evidence that Bott had ever contradicted his testimony during the comparative proceeding. Accordingly, the Commission had no substantial justification for its action in designating the instant proceeding for hearing.

11. Whenever the government contests an application for fees, the first issue to be addressed is "'whether the agency's underlying action that gave rise to the civil litigation is substantially justified....'" Trahan v. Brady, F.2d , (D.C. Cir. 1990), quoting Jones v. Lujan, 887 F.2d 1096, 1098 (D.C. Cir. 1989). The United States Supreme Court has held that "substantially justified" means "'justified in substance or in the main' - that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). The Supreme Court acknowledged that a position may be

justified even if it is ultimately not correct and stated that such a position may be substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Id. at 566 n.2. In the instant proceeding, however, the Commission's action in designating the matter for hearing had no reasonable basis in law or fact. As set forth in the Summary Decision, the designation for hearing rested on "grossly inaccurate characterizations of Bott's actual statements" made by an opposing party. Even after the evidentiary hearing was held, the Summary Decision concluded that there was no evidence of any misrepresentations or lack of candor. Therefore, a reasonable person making an independent reading of Bott's statements could not have concluded that there was any substantial reason to believe that Bott had made misrepresentations or had lacked in candor. Thus, the Commission's position in designating the instant proceeding for hearing was not substantially justified. Accordingly, Bott is entitled to reimbursement of his fees and expenses incurred during the course of the hearing proceeding pursuant to the terms of the EAJA.

#### IV. AMOUNT OF CLAIM

12. Bott applies for an award of \$39,767.83, comprised of the following:

For legal services:

Fletcher, Heald & Hildreth, Ex. 2, Att. 1	
413 hours at \$75.00	\$30,975.00
Reddy, Begley & Martin, Ex. 2, Att. 2	
19.8 hours at \$75.00	1,485.00
Semmes, Bowen & Semmes, Ex. 2, Att. 3	

6 hours at \$75.00	450.00
For incurred expenses of law firms:	
Fletcher, Heald & Hildreth (Ex. 2, Att. 1)	2,825.63
Reddy, Begley & Martin (Ex. 2, Att. 2)	265.00
For preparation of hearing engineering exhibit:	
Suffa and Cavell, Inc. (Ex. 2, Att. 4)	1,205.65 <sup>1</sup>
For expenses incurred directly by Mr. Bott (Ex. 2, Att. 5)	
Travel	2,048.00
Lodging	513.55
	<hr/>
	\$39,767.83

13. The amounts claimed comply with the Commission's rules implementing the Equal Access to Justice Act. In particular, Section 1.1506(b) limits awards for attorneys' fees to \$75.00 per hour, although it is commonly known that attorneys' fees in the Washington, D.C. area, as do the fees of all three law firms comprising portions of Mr. Bott's claim, exceed the \$75.00 per hour limit.<sup>2</sup> Employing the standards contained in Section 1.1506, the presiding judge should award the full amount applied for by Mr. Bott. Moreover, Mr. Bott's other claimed expenses, for preparation of the engineering exhibit introduced into

<sup>1</sup> Comprised of 8.25 hours at \$135.00, 0.5 hours at \$75.00, and \$54.40 expenses. See Exhibit 2, Attachment 4. If the billing of Suffa and Cavell, Inc. is limited to \$75.00 per hour, then the claim for that item would be \$710.65, based upon 8.75 hours.

<sup>2</sup> Fletcher, Heald & Hildreth represented Mr. Bott in the Blackfoot assignment hearing. Reddy, Begley & Martin had represented Mr. Bott in the assignment application's prosecution. Semmes, Bowen & Semmes represented Mr. Bott in the Blackfoot comparative proceeding. Reddy, Begley & Martin and Semmes, Bowen & Semmes provided assistance to Mr. Bott and his hearing counsel in preparing for the assignment hearing.

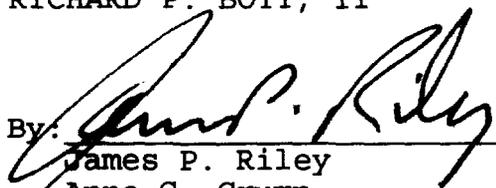
evidence at the hearing and for Mr. Bott's expenses of travel to Washington, D.C. and lodging in Washington, D.C., were both reasonable in amount and essential to the trial.

**CONCLUSION**

Under the authority of Section 1.1527 of the Commission's Rules, the presiding judge should issue a decision awarding Richard P. Bott \$39,767.83, as called for by the Equal Access to Justice Act and relevant Commission Rules.

Respectfully submitted,

RICHARD P. BOTT, II

By: 

James P. Riley  
Anne G. Crump

His Attorneys

FLETCHER, HEALD & HILDRETH  
1300 North 17th Street  
11th Floor  
Rosslyn, Virginia 22209  
(703) 812-0450

April 18, 1994

AGC/#58/EAJAAPP.RB

**APPLICATION FOR AWARD UNDER  
EQUAL ACCESS TO JUSTICE ACT**

Exhibit 1  
Balance Sheet of Richard P. Bott, II  
as of June 1, 1993

PERSONAL BALANCE SHEET  
Richard P. Bott, II  
As Of June 1, 1993  
(Prepared April 15, 1994)

**ASSETS**

Cash	\$ 57,468
Note Receivable	166,909
Automobile	10,450
Home Furnishings (Approx.)	20,000
20% Ownership of Bott Communications, Inc. (Estimated Market Value)	550,000
	_____
Total Assets	\$804,827

**LIABILITIES**

No Debt	-0-
	_____

**NET WORTH** \$804,827

**APPLICATION FOR AWARD UNDER  
EQUAL ACCESS TO JUSTICE ACT**

Exhibit 2 - Expense Documentation

- Attachment 1 - Fletcher, Heald & Hildreth
- Attachment 2 - Reddy, Begley & Martin
- Attachment 3 - Semmes, Bowen & Semmes
- Attachment 4 - Suffa and Cavell, Inc.
- Attachment 5 - Travel and Lodging Expenses

**DECLARATION OF  
JAMES P. RILEY**

I, James P. Riley, hereby declare under penalty of perjury that the following information is true and correct to the best of my knowledge and belief.

I am a partner in the law firm Fletcher, Heald & Hildreth, which was engaged by Richard P. Bott, II in June, 1993 to represent him in the Blackfoot, Idaho proceeding instituted by the FCC's Hearing Designation Order adopted June 1, 1993. This firm's charges to Mr. Bott for legal services and for incurred costs relating solely to our representation of Mr. Bott in the Blackfoot proceeding total \$79,605.63, all of which has been paid.

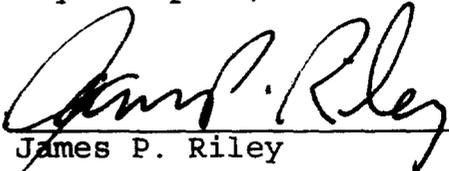
Of the total, the amount of \$2,825.63 was billed to Mr. Bott for reimbursable incurred costs of travel, transcripts, reproduction, supplies, telecopier and telephone, express and courier services, mailing, computer research and off-premises copying. The amount of \$76,780.00 was billed to Mr. Bott for professional services. All hours were billed at this firm's regular rates in effect at the time of the billings. The lowest rate at which time was billed, \$75.00, applied to 6.0 hours of paralegal time. All other time was billed at rates reflecting the firm's regular billing rates for the attorneys devoting time to Mr. Bott's representation.

This firm's legal services were devoted to conferences with the client, investigation, conferences with counsel for other parties, preparation of pre-trial pleadings, discovery matters, appearances before the presiding judge, preparation for trial,

representation of the client at trial and preparation of post-trial motions, proposed findings and conclusions. The paralegal services were devoted to research and to locating and obtaining materials from the files of the FCC.

The attorneys who devoted time to Mr. Bott's representation, and their hours and hourly rates are: James P. Riley, 234 hours, \$225; Patricia A. Mahoney, 1.75 hours, \$185.00; Howard M. Weiss, 4.0 hours, \$175.00; Anne G. Crump, 34.25 hours, \$140.00; Kathleen Victory, 133 hours, \$130/\$140.

Signed and dated this 14<sup>th</sup> day of April, 1994.

By   
James P. Riley

**DECLARATION OF HARRY C. MARTIN**

I, Harry C. Martin, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

I am partner in the law firm of Reddy, Begley & Martin, 1001 22nd Street, N.W., Suite 350, Washington, D.C. 20037. This firm's charges for legal services and related expenses to Richard P. Bott, II in connection with the Blackfoot, Idaho hearing proceeding in MM Docket No. 93-155 have totalled \$3,730.00 since the proceeding was designated for hearing on June 15, 1993. Such charges were incurred in connection with consultation with Mr. Bott and his hearing attorney, James P. Riley, and in assembling and reviewing materials relevant to the Blackfoot proceeding.

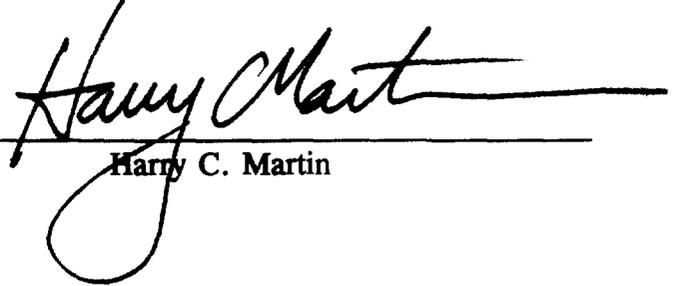
The \$3,730.00 charged for legal fees and expenses may be broken down as follows:

19.8 hours legal services @ \$175.00 per hour	\$3,465.00
Expenses (telephone, courier, fax, duplication & postage)	<u>265.00</u>
	\$3,730.00

\$175.00 per hour was this firm's customary rate for legal services during the period of time the services reflected herein were performed.

2.

Signed and dated this 4th day of April 4, 1994.



Harry C. Martin

**SEMMES, BOWEN & SEMMES**

ATTORNEYS AT LAW  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
280 WEST PRATT STREET  
BALTIMORE, MARYLAND 21201  
(410) 538-5040

FEDERAL I.D. # 88-0472970

Richard P. Bott, II  
Bott Broadcasting Company  
8801 East 63rd Street  
Kansas City, MO 64133

07/31/93  
INTERIM

SB&S Bill No.: 85442

Blackfoot Litigation

12449-00001

In connection with the handling of the above titled matter:

<u>Date</u>	<u>Activity</u>		<u>Hours</u>
6/14/93	Telephone conference with R. Bott and H. Martin. Review pleadings	BAF	2.70
6/15/93	Receipt and review of papers pleadings and call from R. Bott.	BAF	2.50
6/16/93	Telephone conference with H. Martin and Bott on strategy.	BAF	.50
Total Fee . . . . .			\$1,111.50
Disbursements:			
Total Disbursements . . . . .			\$0.00
Total Fee and Disbursements . . . . .			\$1,111.50

**SEMMES, BOWEN & SEMMES**

ATTORNEYS AT LAW  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
250 WEST PRATT STREET  
BALTIMORE, MARYLAND 21201  
(410) 539-5040

FEDERAL I.D. # 82-0479970

Richard P. Bott, II  
Bott Broadcasting Company  
8801 East 63rd Street  
Kansas City, MO 64133

08/31/93  
INTERIM

SB&S Bill No.: 98144

Blackfoot Litigation

12449-00001

In connection with the handling of the above titled matter:

<u>Date</u>	<u>Activity</u>		<u>Hours</u>
7/29/93	Telephone conference with J. Riley on pleadings and litigation strategy.	BAF	.30
Total Fee . . . . .			\$58.50
Disbursements:			
Total Disbursements . . . . .			\$ .00
Total Fee and Disbursements . . . . .			\$58.50

**Suffa and Cavell, Inc.**  
Consulting Engineers  
10300 Eaton Place, Suite #450  
Fairfax, VA 22030  
703-591-0110

**Statement**

August 31, 1993

Richard P. Bott II  
c/o Bott Broadcasting  
8801 63rd Street  
Kansas City, MO 64133

Client #: 380

**Project:** Idaho Falls Terrain Limited Coverage Study

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**Professional Services & Expenses:**

8.25 hrs. Principal Time (\$135.00/hr)	\$ 1113.75
0.5 hrs. Drafting Time (\$ 75.00/hr)	\$ 37.50
<b>Expenses:</b> (Maps, Database)	\$ 54.40

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**Balance Due:** \$ 1205.65

**A discount of 5% (\$57.56) may be taken off professional services if payment is received by September 10, 1993.**

**NOTE: An overdue fee of 1.5% will be applied if payment is not received by September 30, 1993.**

**(Please write your client and project numbers on the bottom of your check. Thank you!)**

**TRAVEL AND LODGING  
EXPENSES RELATED TO  
BLACKFOOT HEARING**

Travel To Washington, D. C.	\$2,048.00
Check #1169	
Check #1180	
Check #1281	
Lodging In Washington, D. C.	513.55
Check #1176	
Check #1217	
	<hr/>
TOTAL	<b><u>\$2,561.55</u></b>

**APPLICATION FOR AWARD UNDER  
EQUAL ACCESS TO JUSTICE ACT**

Declaration of Richard P. Bott, II  
Verifying Information in the Application

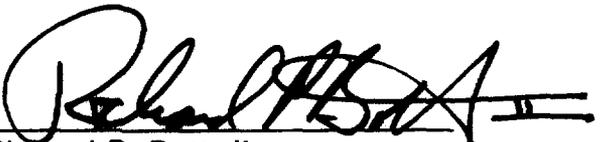
**Declaration of Richard P. Bott, II**

I, Richard P. Bott, II, hereby declare as follows:

I have reviewed the "Application for Award Pursuant to the Equal Access to Justice Act" with which this declaration is filed, and I hereby verify that the information provided in the Application is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 1994.

  
Richard P. Bott, II

I, Roberta Wadsworth, a secretary in the law firm of Fletcher, Heald & Hildreth do hereby certify that true copies of the foregoing "Application for Award Pursuant to the Equal Access to Justice Act" were sent this 18th day of April, 1994, by first class United States mail, postage prepaid, to the following:

Charles Dziedzic, Esquire  
Counsel for Chief  
Mass Media Bureau  
Federal Communications Commission  
Room 7212  
2025 M Street, N.W.  
Washington, DC 20554

David D. Oxenford, Jr., Esquire  
Fisher, Wayland, Cooper & Leader  
2001 Pennsylvania Ave., N.W.  
Suite 400  
Washington, DC 20006-1851

  
Roberta Wadsworth  
Roberta Wadsworth