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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-107
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

**REPLY TO SUPPLEMENT TO SECOND MOTION TO ENLARGE
THE ISSUES AGAINST DAVIS**

Shellee F. Davis, by her attorney, hereby submits her reply to the "Supplement to Second Motion to Enlarge the Issues Against Davis" ("Supplement"), filed by Ohio Radio Associates, Inc. in this proceeding. With respect thereto, to following is stated:

1. As Davis has stated previously, Mid-Ohio Communications, Inc. ("Mid-Ohio"), who was the owner of the transmitter site designated in Davis' application, clearly stated at the time that Davis filed her application that its site would available to Davis for her use as a transmitter site for her proposed FM radio station (for \$6000 per month) and therefore it was also willing to negotiate a lease at the appropriate time.

Land leases contain a variety of terms (regarding access, term, default, etc.) all unrelated

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to the Commission processes, all of which are terms which the Commission allows parties to defer negotiation of until resolution of the comparative contest. Permission to designate the site specifically was given by Mid-Ohio.¹ The majority of the parties (including, at one time, ORA) consequently designated the site.

2. This was proper. As the Commission has 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. See, e.g., National Innovative Programming Network, supra., 2 FCC Rcd at 5643 ¶ 11, and Low Power Television and Television Translator Service, 102 FCC 2d 295, 309 (1984). 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

¹ 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.

not negate a finding of the existence of "reasonable assurance" of site availability. *Id.* at ¶ 11.

3. As Davis established in previous pleadings, the cases cited by ORA are inapposite and frankly not remotely applicable. For example, ORA cites Emission de Radio Balmeseda, Inc., 7 FCC Rcd 8629 (Rev. Bd. 1993), and Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332 ¶ 11 (1987). See Supplement at 2. Emission de Radio Balmeseda, Inc., 7 FCC Rcd 8629 n.4 (Rev. Bd. 1992), is not even a case concerning the Commission's site availability standard, and at best, stands for the proposition that a "willingness to negotiate" standing alone would not constitute "reasonable assurance" (e.g., of being financially qualified). Here, there was more than merely a "willingness to negotiate." Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331 (1991), establishes nearly the opposite of what ORA claims -- there, the Commission determined that even an applicant's informal telephone contacts with a landowner, with details to negotiated at a future date, even where no basic terms were actually agreed upon, can be sufficient to sustain a good faith belief of site availability. *Id.* at 4332-33 ¶¶ 11-13.

4. Similarly, in National Communications Industries, 6 FCC Rcd 1978, 1979 ¶ 10 (Rev. Bd. 1991), unlike here, there was no "meeting of the minds" as here concerning the availability of the specified site -- in National 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 1555, 1589 ¶ 6 (Rev. Bd. 1990), and El Camino Broadcasting Corp., 12 F.C.C.2d 25, 26 (Rev. Bd. 1968), where there was no "meeting of the minds" as to the availability of the site and the landowner had stated or indicated only that he was willing to discuss the possibility of the availability of the site at some time in the future, the Review Board stated:

In our view, the mere fact that the property owner has indicated that he would discuss the possibility of a lease at some future date does not absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance that an unrejected offer.

El Camino, 12 F.C.C.2d at 26, ¶ 5 (emphasis added). Here, the "favorable disposition" of Mid-Ohio was evident.

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

Davis (and other parties) received from Mid-Ohio was "only" a "willingness to negotiate" (Supplement at 2), Mid-Ohio's representative in fact specifically stated at all times during which Mid-Ohio was the owner of the property that Mid-Ohio remained willing to lease the transmitter site, studio space, and possibly certain related equipment, at various basic, already agreed-to terms. Therefore, Davis properly received a "clear indication from the landowner that [it was] 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 did indeed have a "reasonable assurance" of the availability of her proposed transmitter site, as properly concluded by the Presiding Judge in this proceeding.

WHEREFORE, for the reasons stated herein, it again is respectfully requested that the Review Board affirm the ruling of the Presiding Judge (MO&Q, FCC 93M-395 (June 24, 1993)), and determine that an issue inquiring whether Shellee F. Davis had reasonable assurance of her transmitter site based upon her contacts with Mid-Ohio Communications, Inc., was not warranted.

Respectfully requested,

SHELLEE F. DAVIS

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April 20, 1994

CERTIFICATE OF SERVICE

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