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Federal Communications Commission
Washington, DC

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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

MOTION TO STRIKE

Shellee F. Davis, by her attorney, hereby moves to strike 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. ORA "Supplement" must be stricken as patently defective and untimely.

The "Second Motion to Enlarge" issues which ORA seeks to "supplement" has already been decided and denied by the presiding officer before whom it was raised, Judge Walter C. Miller. MO&O, FCC 93M-395 (June 24, 1993). Even though that ruling is on appeal through ORA's filing of exceptions to the ruling, the record with regard to that Motion obviously is frozen, and to the extent the supplement seeks reconsideration of that ruling, such petitions for reconsideration are not permitted under the rules. 47

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C.F.R. § 1.106(a)(1). In any event, such a supplement, even if accepted, changes nothing with respect to the content of the ORA's Exceptions, which is the only document dealing with the requested "site issue" which is properly before the Board at the present time. Those exceptions have not been supplemented, and mere incorporation by reference of a Supplement such as ORA has filed into another pleading such as its Exception will not be permitted. Nuance Corp., 47 R.R.2d 1405 (Rev. Bd. 1980). Thus, acceptance of ORA's Supplement will serve no procedurally proper, or functionally useful, purpose.

2. On its merits, ORA "Supplement" also adds nothing to the record. 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 throughout this proceeding that its site would be available (at a price of \$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 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

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.

(including, at one time, ORA) consequently designated the site. This was proper. As the Commission 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. 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 not negate a finding of the existence of "reasonable assurance" of site availability. Id. at ¶ 11.²

² 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 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." In 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 ¶¶ 11-13.

3. Far from confirming that all that Davis (and other parties) received from Mid-Ohio was "only" a "willingness to negotiate" (Supplement at 2), as Mid-Ohio's representative specifically stated at all times during which Mid-Ohio was the owner of the property, 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

Similarly, in National Communications Industries, 6 FCC Rcd 1978, 1979 ¶ 10 (Rev. Bd. 1991), there was no "meeting of the minds" as here 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, in 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 sites 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. Thus, 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, in contrast, the existence of a "favorable disposition" was evident.

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 its would enter into a lease, and provided clear indications that it was "favorably disposed" to entering into such a lease.

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 had "reasonable assurance" of the availability of her proposed transmitter site, as properly concluded by the Presiding Judge in this proceeding.

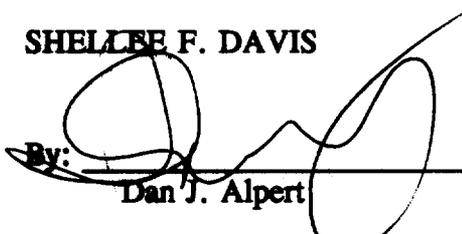
4. It is questionable whether ORA's Supplement even has been filed with any glimmer of good faith. It avoids discussing or distinguishing the recent binding Commission precedent on the topic it addresses, cites irrelevant cases, misstates the holdings of cases, and does not even satisfy the Commission's current filing standards. 47 C.F.R. § 1.49(a). In all respects, it appears to be directly violative of Section 1.52 of the Rules, insofar as there appears to be no good grounds to support the assertions or relief contained therein.

5. For all of these reasons, ORA's "Supplement to Second Motion to Enlarge the Issues Against Davis" should be stricken as untimely, unsupported, and otherwise procedurally defective.

WHEREFORE, it is respectfully requested that this Motion be granted.

Respectfully requested,

SHELLEE F. DAVIS

By: 
Dan J. Alpert

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April 20, 1994

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that foregoing document was served on April 20, 1994 upon the following parties by First Class Mail, postage prepaid, or by Hand:

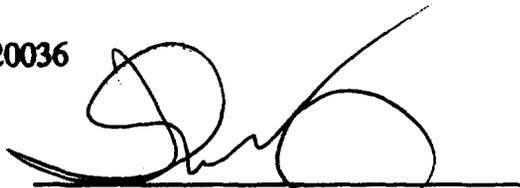
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